Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

VICTOR HASSINE,

Petitioner,

v.

CHARLES ZIMMERMAN, SUPERINTENDENT, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Certiorari Should Be Granted to Resolve a Conflict Among the Lower Courts Regarding Whether it Is Appropriate to Apply the *Brecht* Deferential Standard for Evaluating a *Doyle* Error on Federal Habeas Corpus Review When the State Courts Have Failed to Conduct a *Chapman* Review on Direct Appeal.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit are as follows: Victor Hassine, Charles Zimmerman, Superintendent, and the Attorney General of the State of Pennsylvania.

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PETITION FOR WRIT OF CERTIORARI

Victor Hassine, the petitioner below and the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 9, 1998.

OPINIONS BELOW

The November 9, 1998 opinion of the Court of Appeals is reported at *Hassine v. Zimmerman*, 160 F.3d 941 (3d Cir. 1998) and is reprinted herein in the separate appendix to this petition, along with the Judgment. App. 1-51. The prior opinions of the United States District Court for the Eastern District of Pennsylvania, entered October 30, 1997 and November 15, 1989, are unreported and are reprinted in the separate appendix to this petition, App. 52-74 and App. 75-88, respectively. The opinion of the Pennsylvania Superior Court is reported at *Commonwealth v. Hassine*, 340 Pa. Super. 318, 490 A.2d 438 (1985).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 9, 1998. App. 50-51. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves rights arising under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Relevant Procedural History

Petitioner Victor Hassine and a co-defendant, George Orlowski, were convicted of multiple counts, including murder and attempted murder, in the Court of Common Pleas of Bucks County on June 11, 1981. The Superior Court of Pennsylvania affirmed Hassine's conviction on February 8, 1985, and the Pennsylvania Supreme Court denied his petition for allowance of appeal. His conviction became final on April 15, 1986.

Petitioner's allegation of error under *Doyle v. United States*, 426 U.S. 610 (1976), was raised in the state courts, however, the Superior Court of Pennsylvania erroneously held that the questions and closing argument about his silence during the post-arrest months leading up to trial were proper. *Commonwealth v. Hassine*, 490 A.2d at 450-451 (1985). Because no *Doyle* error was found, the Pennsylvania courts did not conduct a *Chapman* analysis.

On October 28, 1986 Hassine filed a petition for a writ of habeas corpus in which he claimed that his federal constitutional rights were violated when the prosecution repeatedly discredited his exculpatory trial testimony by exploiting the fact that – following his arrest and *Miranda* warnings – petitioner remained silent in jail for seven

months awaiting trial, instead of coming forward with the explanation of his innocence.

On November 19, 1986 the district court referred the case to a United States Magistrate for a Report and Recommendation on Hassine's 28 U.S.C. § 2254 petition. The Report and Recommendation was issued on June 15, 1988. The Magistrate found that the Commonwealth had violated Hassine's due process rights by using Hassine's post-arrest, pre-trial silence to impeach his exculpatory testimony at trial. Acknowledging that it is "impossible to determine what effect" the prosecution's unconstitutional impeachment of Hassine's trial testimony had on the jury, the Magistrate nevertheless concluded that the constitutional error was harmless, finding it "highly probable" that the error did not affect the judgment.[1]

Hassine filed objections to the Report and Recommendation on June 24, 1988, and the district court granted *de novo* review of the Magistrate's findings, pursuant to 28 U.S.C. § 636(b)(i)(c). In a Memorandum and Order dated November 15, 1989, the district court found that the sequence of events at Hassine's trial – "three specific inquiries [concerning Hassine's post-arrest, post-*Miranda* silence], three sustained objections, absence of any curative instructions and further comment made by the prosecutor during closing" – permitted the jury "to draw an impermissible inference of guilt from Hassine's silence," in violation of *Doyle v. United States*, 426

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[1] The Magistrate made a passing reference to the *Chapman* standard, but then erroneously applied the less stringent non-constitutional error standard set forth in *Government of Virgin Islands v. Martinez*, No. 87-3773 (3d Cir. 1988). App. 55 n.2, 87.

U.S. 610 (1976) and its progeny. App. 86. Because the Magistrate had failed to apply the clearly controlling standard of review set forth in *Chapman v. California*, 386 U.S. 18 (1967), the district court held the Report and Recommendation "under advisement," and scheduled oral argument on the issue of whether the Commonwealth's federal constitutional error was harmless.

Nearly four years later, the district court scheduled a conference call to "discuss the significance, if any" of the then recent decision in *Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L.Ed.2d 353, 113 S. Ct. 1710 (1993).

On October 30, 1997 – a full eleven years after the filing of Hassine's habeas petition – the district court issued a Memorandum and Order denying the petition. App. 52-74. The district court concluded that the *Brecht* standard applies, even though a *Chapman* analysis had never been conducted on direct review of Hassine's claims.

The district court issued a certificate of probable cause on November 6, 1997.

On November 9, 1998, the United States Court of Appeals for the Third Circuit affirmed the district court. This petition follows.

STATEMENT OF FACTS

Petitioner Victor Hassine was tried for murder arising from a shooting on Friday, August 22, 1980. In brief summary: William Decker, an "itinerant drug fiend and

convicted felon,"[2] having just injected a "couple grams of speed," had a confrontation with Albert "Skip" Kellet over Kellet's alleged harassment of Decker's friend, Greg Orlowski. Later that evening Decker sought out, shot and seriously wounded Kellet and his wife, and killed an uninvolved bystander.

Twelve hours after the shooting Decker was arrested at the home of his girlfriend (NT 101, 103). An hour later, Decker confessed to the police. (NT 103). Over time, Decker entered into a negotiated plea bargain with the district attorney. The terms of this bargain required Decker to testify against Hassine and Orlowski in exchange for avoiding the death penalty for his capital crime.

Some three months later, on November 22, 1980, Hassine was arrested, given his *Miranda* warnings and imprisoned to await trial. Hassine did not, at any time, give a statement to the authorities. Hassine's in-court testimony was the first occasion on which he offered his account of his activities on the night in question.

Hassine was charged with First Degree Murder, and a death-qualified jury was selected to hear the case. Although the defenses of Hassine and Orlowski were patently inconsistent, they were tried together. The essence of the evidence by which the prosecution sought to tie Hassine to Decker's shootings was testimony that he had met with Decker on August 22, after the earlier Decker-Kellet confrontation and arranged to provide Decker with a gun for the purpose of killing Kellet (NT

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[2] *Commonwealth v. Hassine*, 490 A.2d at 445 (1985).

76-77). The sole source of this crucial testimony was Decker. There was no physical evidence linking Hassine to Decker's crime. "Decker was cross-examined on his frequent use of methamphetamine, prior record, shifting stories, and his cooperation with the Commonwealth. Other witnesses were questioned about their prior denials to the police, changes in accounts, drug usage, conflicts with Hassine, bias in favor of Orlowski, or reluctance to testify." App. 38, n.25.[3]

Testifying in his own behalf, supported by corroborating witnesses, Hassine categorically denied making any such arrangement and stated that he had nothing to do with the killing.[4]

At trial, the prosecutor exploited Hassine's post-arrest, pre-trial silence by persistently cross-examining Hassine as to why he had languished in jail for months

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[3] Three of the prosecution's circumstantial evidence witnesses also testified pursuant to plea agreements in their unrelated criminal cases.

[4] Petitioner testified that he was never part of any plan to kill or beat up Kellet. Instead of planning a murder during June and July, he said he was studying for the New York and New Jersey bar exams, which he took on July 28, 29, and 30.

Petitioner's brother, Eli Hassine, a New York attorney, was with petitioner on the night of August 22nd and supported petitioner in important aspects of his testimony (NT 1648-1674). Petitioner's father, Samuel Hassine, supported other aspects of petitioner's account, specifically denying that his gun was taken from his home by petitioner and Decker on the night of August 22nd. Samuel Hassine confirmed petitioner's testimony that Kellet's threats were sufficiently worrisome for Samuel Hassine to have given his gun to Orlowski in early August to keep for his protection (NT 1606-1607, 1621).

awaiting trial, instead of advancing the explanation of his innocence to which he testified at trial:

[THE PROSECUTOR:]

Q. How long have you been sitting in jail, sir?

A. Close to seven months.

Q. And you have been sitting in Bucks County Prison?

A. No, sir.

Q. You were in Bucks County Prison for a time?

A. About a month and a half.

Q. You were sitting in Holmesburg Prison?

A. For about five months.

Q. And another prison?

A. Delaware County.

Q. And conditions are not very good?

A. No, sir.

Q. You sat for seven months in prison with the knowledge of what was really involved in regard to this gun, and you just kept it to yourself because your attorney said to keep it to yourself?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

BY [THE PROSECUTOR]:

Q. But you kept it to yourself until you came in to a court of law today and said it for the

> first time, in any event, outside of perhaps your family or your lawyer?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> BY [THE PROSECUTOR]:
>
> Q. For the first time?
>
> [DEFENSE COUNSEL]: That is objected to.
>
> THE COURT: Sustained.

App. 11-12, 65-66, 81-82, NT 1543-44.

Thus, before asking the forbidden series of questions to which each defense objection was sustained, the prosecutor developed the fact that Hassine had spent seven months in prison awaiting trial. Only after painting a picture of the "not very good" prison conditions did the prosecutor pose his three pointed questions concerning Hassine's decision to reserve his exculpatory explanation for trial. The prosecutor was unequivocally telling the jury that no innocent man would ever withhold an honest exculpatory explanation for so long, under such conditions. The jury could not have missed the point. But just in case they had, the prosecutor's closing again highlighted Hassine's post-arrest, pre-trial silence. No curative instructions were given during Hassine's testimony or in the jury charge. App. 66 n.6, 85 n.3. As Judge Nygaard stated in his concurrence in the Court of Appeals:

> I write separately only to . . . express my indignation with the prosecuting attorney's misbehavior. The concept of an accused's right to

> remain silent, to be free from prosecutorial comment about that silence, and to be free from any adverse consequences from accepting this constitutional protection, is so fundamental in our jurisprudence, and is so well known among practitioners, that I cannot conceive of any alternative but that the prosecutor's use of Hassine's silence was both deliberate and calculated to invite the jury to draw an adverse inference from it. Moreover, I believe this deliberate violation of Mr. Hassine's constitutional rights is egregious – indeed, it is outrageous. The prosecutor not only questioned Hassine about his silence, but continued to do so even after objections to the questions were sustained by the trial court. This arrogance towards the court's ruling and the accused's rights, is reprehensible.

App. 48-49.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve a Conflict Among the Lower Courts Regarding Whether it Is Appropriate to Apply the *Brecht* Deferential Standard for Evaluating a *Doyle* Error on Federal Habeas Corpus Review When the State Courts Have Failed to Conduct a *Chapman* Review on Direct Appeal.

In *Brecht*, this Court held that the *Kotteakos*[5] harmless error standard applies in determining whether federal habeas relief must be granted because of a constitutional

[5] *Kotteakos v. United States*, 328 U.S. 750, 90 L.Ed. 1557, 66 S. Ct. 1239 (1946).

error. In so ruling, the Court relied heavily on the ability of state courts to evaluate the prejudicial effect of a *Doyle* error under the *Chapman* standard:

> [W]e must decide whether the same harmless error standard that the state courts applied on direct review of petitioner's *Doyle* claim also applies in this habeas proceeding. We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence in this case requires reversal of his conviction.
>
> ***
>
> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. *See Rushen v. Spain*, 464 U.S. 114, 120, 104 S. Ct. 453, 456, 78 L.Ed.2d 267 (1983) (per curiam). For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Brecht, 507 U.S. at 635-636.

Brecht did not address the issue of the harmless error standard to be applied on review of cases, such as this one, where the state courts have failed to conduct a *Chapman* review. This unresolved question has fostered a significant divide among the lower courts. Some courts have looked to the reasoning behind the decision in *Brecht* – avoiding a second bite at the same apple – in requiring a *Chapman* review where none was conducted

in the state courts. A majority have adopted the *Brecht* rule, *per se*, without regard to the procedural posture of the case. Petitioner submits that *Brecht* should be applied in such a fashion as to avoid the anomalous result of denying the victim of a *Doyle* violation the *Chapman* review to which he would have been entitled, absent the failure of the state court to even recognize the error.

Adopting the view that this Court intended the lower courts to exercise reason over mechanics, in *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), *cert. denied*, 511 U.S. 1060 (1994), the Eighth Circuit explicitly held that the *Brecht* rule does not apply in cases where the federal habeas court is the first court to review the constitutional error:

> We believe the *Brecht* rule is based largely on the notion that because the state courts can properly apply the *Chapman* harmless error standard on direct review, the federal habeas courts need only review those decisions under the *Kotteakos* harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the *Chapman* harmless error standard. As a result, we find that the rule announced in *Brecht* does not apply and that the *Chapman* harmless error standard is the appropriate test in this case.

Subsequently, in *Starr v. Lockhart*, 23 F.3d 1280, 1292 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994), the Eighth Circuit reaffirmed that *Chapman* is the appropriate standard of review in cases, like Hassine's, where the state courts had

the opportunity to address the constitutional error under *Chapman*, but did not do so because they found there was no error. *See also Williams v. Clarke*, 40 F.3d 1529, 1541 (8th Cir. 1994), *cert. denied*, 514 U.S. 1033 (1995).

Likewise, the court in *Lyons v. Johnson*, 912 F. Supp. 679, 688 (S.D.N.Y.), *aff'd*, 99 F.3d 499 (2d Cir. 1996) stated:

> Rather than simply invoking comity and federalism alone, *Brecht* explicitly noted state courts' ability separately (1) to identify constitutional error, and (2) to evaluate the effect of that error under *Brecht*'s result, then, was premised largely on respect for the actual, conscientious review of the harmlessness performed by the four prior courts – both federal and state – that applied *Chapman*.

(Citation and footnote omitted.) On appeal the Second Circuit acknowledged the issue but concluded that it need not reach the question in that case, finding that the error was not harmless under either *Brecht* or *Chapman*. *Lyons v. Johnson*, 99 F.3d 499, 503 (2d Cir. 1996). The Second Circuit also took note of the issue in *Scott v. Strack*, 1998 U.S. App. LEXIS 22376, *7-*9 (2d Cir. 1998), but again determined that it need not reach the question because the error involved was harmless under either standard. *See also Agard v. Portunondo*, 117 F.3d 696, 714 n.20 (2d Cir. 1996).[6]

In *Rickman v. Dutton*, 864 F. Supp. 686, 712 (M.D. Tenn. 1994), *aff'd sub nom. Rickman v. Bell*, 131 F.3d 1150

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[6] The Ninth Circuit also has not yet had occasion to resolve the issue. *Hanna v. Riveland*, 87 F.3d 1034, 1038 n.2 (9th Cir. 1996).

(6th Cir. 1997), *cert. denied*, 118 S. Ct. 1826, 140 L.Ed.2d 962 (1997), the district court also concluded that *Brecht* did not apply where the state court had failed to conduct a *Chapman* review:

> Notably, the Tennessee Supreme Court's opinion does not reveal that the court conducted harmless-error analysis under *Chapman*. This Court is therefore the first court to review the error in this case and is required to conduct harmless error analysis under *Chapman* rather than under *Kotteakos*. *See Starr v. Lockhart*, 23 F.3d 1280, 1292 (8th Cir. 1994); *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1631, 128 L.Ed.2d 354 (1994).

Other circuits have held that federal courts reviewing constitutional errors on collateral review should apply *Brecht* in all cases, even where there was no *Chapman* review by the state courts. *See e.g., Smith v. Dixon*, 14 F.3d 956, 979-980 (4th Cir.), *cert. denied*, 513 U.S. 841 (1994); *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1297 (1998); *Tyson v. Trigg*, 50 F.3d 436, 446-447 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996); *Brewer v. Reynolds*, 51 F.3d 1519 (10th Cir. 1995), *cert. denied*, 516 U.S. 1123 (1996); and *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir. 1995), *cert. denied*, 516 U.S. 960 (1995). These decisions, however, do not comport with the reasoning set forth in *Brecht*.

In *Dixon*, the Fourth Circuit baldly concluded that *Brecht* required federal habeas courts to apply the *Kotteakos* standard in reviewing errors for harmlessness, without even acknowledging that its ruling had the effect of depriving the petitioner of the right to have any court

apply the *Chapman* standard to his claim. *See also Sherman v. Smith*, 89 F.3d 1134, 114-41 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 765 (1997); and *Tuggle v. Netherland*, 79 F.3d 1386 (4th Cir. 1996). The Tenth Circuit in *Brewer* did the same thing. *Brewer*, 51 F.3d at 1529; *Castro v. Oklahoma*, 71 F.3d 1502, 1515-1516 (10th Cir. 1995). *See also Davis v. Executive Director of Department of Corrections*, 100 F.3d 750 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1703 (1997).

Although it reviewed the cases from the other circuits, the court below added no new reasons or analysis to explain the inherent unfairness and lack of purpose in mechanically applying *Brecht* where the state courts had failed to even engage in a *Chapman* analysis on direct appeal.

While the courts that have rejected the claim made here stated that nothing in the *Brecht* holding suggested limitation to cases in which a state court had applied the harmless beyond a reasonable doubt standard,[7] *Brecht* itself is replete with references to the ability of state courts to conduct *Chapman* reviews and the fact that three courts had applied *Chapman* to Brecht's claims. *Brecht*, 507 U.S. at 626-627, 635-636.

Indeed, in *Brecht* this Court articulated the question under review: "We must decide whether the same harmless error standard that the state courts applied on direct review of petitioner's *Doyle* claim also applies in this

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[7] *See Tyson v. Trigg*, 50 F.3d 436, 446-447 (7th Cir. 1995). The Fifth Circuit in *Hogue* took a similar approach. *Hogue v. Johnson*, 131 F.3d 466, 498-499 (5th Cir. 1997). *See also Billiot v. Puckett*, 135 F.3d 311 (5th Cir. 1998).

habeas proceeding." *Id.* at 635-636. In *California v. Roy*, 117 S. Ct. 337, 338 (1996), where the state courts had conducted a *Chapman* review of a jury instruction error, this Court specifically referenced the state court determination in its description of the *Brecht* holding: "[A] federal court reviewing a state court determination in a habeas proceeding, ordinarily should apply the 'harmless error' standard that the Court had previously enunciated in *Kotteakos*[.]"

As the court noted in *Lyons*:

> I do not believe the *Brecht* plurality wrote its decision on the assumption that the average habeas case is one in which the state court ignores or misses federal constitutional error that a federal court will later recognize – as happened here, and as did not happen in *Brecht* itself. The plurality opinion in *Brecht* suggests, on the contrary, that the *Brecht* plurality strongly believed in the state courts' ability to render conscientious, accurate federal constitutional interpretations. *See Brecht*, 507 U.S. at ___, 113 S. Ct. at 1721 ("State courts are fully qualified to identify constitutional error.").

Lyons, 912 F. Supp. at 688.

In *Barber v. Johnson*, 145 F.3d 234, 236-237 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 518 (1998), a panel of the Fifth Circuit criticized the mechanical application of *Brecht* in *Hogue*. Specially concurring in *Barber*, Judge Dennis cogently stated the case for a *Chapman* review:

> . . . I write specially to express my belief that the Supreme Court's holding in *Chapman v. California* requires that when state courts on direct review have disregarded their constitutional

duty to apply the rigorous "beyond-a-reasonable-doubt" standard to constitutional error, federal courts on collateral review must apply the *Chapman* harmless-error standard as part of their obligation to vindicate federal constitutional rights and to protect criminal defendants from unconstitutional convictions and sentences . . . "The State bears the burden of proving that an error passes muster under this standard." *Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L.Ed.2d 353, 113 S. Ct. 1710 (1993). The *Chapman* standard protects those rights that are "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.' " *Chapman*, 386 U.S. at 21. Therefore, the *Chapman* harmless-error rule is of constitutional magnitude because it is the "necessary rule" fashioned by the Supreme Court to fulfill its responsibility "to protect people from infractions by the States of federally guaranteed rights." *Id.*

The Supreme Court's subsequent holding in *Brecht v. Abrahamson* did not lessen that requirement, but only relieved federal habeas courts of the obligation of duplicating the *Chapman* analysis when state courts on direct review already have satisfied this constitutionally mandated harmless-error review. It is clear to me that the *Brecht* Court's new rule assumes that a finding of harmlessness by the state courts under the rigorous *Chapman* rule always will precede federal habeas corpus review of the harmlessness question under the less stringent rule of *Kotteakos v. United States*, 328 U.S. 750, 90 L.Ed. 1557, 66 S. Ct. 1239 (1946). *See Brecht*, 507 U.S. at

> 636 ("It scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review."). In support of its decision, the *Brecht* Court adverted to the State's interest in the finality of convictions that survive direct review within the state court system. *Id.* at 635. The Court relied also on the principles of comity and federalism: " 'Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 128, 71 L.Ed.2d 783, 102 S. Ct. 1558 (1982)). Federal courts cannot justify abstaining from the enforcement of an individual's constitutional right in deference to the systemic values of finality, federalism, and comity, however, unless there has in fact been a good-faith State effort to protect constitutional rights by applying the *Chapman* standard. *See id.*; John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 WM. & MARY L. REV. 163, 183-84 (Fall 1993).

145 F.3d at 237-238.

Five years post-*Brecht*, the lower courts are plainly divided as to the standard to be applied in a habeas harmless error analysis when the state courts have failed to conduct a *Chapman* review. This Court should give the lower courts guidance on whether *Brecht* enunciated an absolute rule of deference, without regard to the proceedings in the state courts or whether the intent was to

dispense with the *Chapman* standard in federal court only when state courts had already applied *Chapman*.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Filed NOVEMBER 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1969

VICTOR HASSINE,

Appellant

v.

CHARLES ZIMMERMAN, Superintendent, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(DC. Civil No. 86-6315)

Argued: August 4, 1998

Before: NYGAARD, ALITO, and RENDELL, *Circuit Judges*

(Opinion Filed: November 9, 1998)

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OPINION OF THE COURT

RENDELL, *Circuit Judge:*

On January 4, 1983, a Pennsylvania state court sentenced Victor Hassine to life in prison, following his 1981 conviction on charges of first degree murder, attempted murder, criminal conspiracy, and criminal solicitation. Now, more than fifteen years later, we are faced with the question of whether to vacate Hassine's conviction by granting his petition for habeas relief brought pursuant to 28 U.S.C. § 2254. Hassine contends that relief is warranted because the state prosecutor sought to use his post-arrest silence for impeachment purposes at trial in violation of the due process principles established in *Doyle v. Ohio*, 426 U.S. 610 (1976). The district court found that a Doyle violation had occurred, but it concluded that any constitutional error was harmless under the standard announced in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). We agree that the prosecutor violated *Doyle* by seeking to elicit testimony concerning Hassine's post-arrest silence. We also agree that *Brecht* is the proper standard to apply on collateral review. Because we agree further that the *Doyle* violation was harmless under *Brecht*, we will affirm.

I. FACTUAL AND PROCEDURAL HISTORY

A. *The Murder Conspiracy*

This case arises out of a conspiracy involving Hassine and his co-conspirators George Gregory Orlowski and William Eric Decker, which culminated in the August 22, 1980, murder of James Puerale and the shootings of Albert "Skip" Kellet and Lois Kellet.

The evidence at trial showed that Hassine first met Orlowski in 1979, and that shortly thereafter they decided to open a store in Morrisville, Pennsylvania, called Greg's Quality Meat Market ("the Market"). The store was financed by Hassine's family, overseen and supervised by Hassine himself, and operated on a daily basis by Orlowski. However, the Market soon experienced financial problems, and, with Hassine's knowledge, Orlowski began selling marijuana and methamphetamine from a back room in the store.

In June 1980, Albert Kellet, a close friend of Orlowski, purchased $150 of methamphetamine at the Market. Upon returning home, Kellet discovered that the drugs were of inferior quality and he became enraged. He called Orlowski and invited him to his apartment under the false pretense of wishing to buy more methamphetamine. When Orlowski arrived, Kellet threatened him with a club, stole all of his money and drugs, and threw him out of the apartment.

Several days later, Orlowski, Hassine, and Decker, among others, met at the Market to discuss Kellet's actions. The State's witnesses testified that at this meeting, Hassine announced that he wanted Kellet "wasted"

and that if Lois Kellet, Albert's wife, was present, she "was to go also, because any witnesses had to go." As a result, Hassine, Decker, and Orlowski made several attempts over the next month to obtain a gun with which to kill Kellet, and they investigated the possibility of paying two other individuals to have Kellet murdered. A number of confrontations between Hassine and Kellet also erupted during this time, and, on at least one occasion, Hassine instructed Decker to shoot Kellet and to kill him. Because it was daylight and a witness was present, Decker declined. Nevertheless, on August 22, 1980, Decker had his own encounter with Kellet, and he returned to the Market to tell Hassine that "[t]onight's the night – the cat's got to go. We'll use your gun."

According to the State's witnesses, Hassine picked Decker up later that evening and drove him to Hassine's parents' house in Trenton, New Jersey. While Decker waited in the car, Hassine entered the house and obtained his father's .380 caliber Llama handgun. Hassine then drove Decker to Kellet's apartment building and gave him the gun and a New York Yankees batting helmet to cover his hair. As Decker approachd the building, he saw Kellet in a first-floor apartment watching television with his wife Lois, and with James Puerale and George Sofield. Decker entered the apartment, surveyed the room, and opened fire, killing Puerale instantly and injuring Skip and Lois Kellet with shots to the head.

The police arrested Decker the next day, and arrested Hassine three months later, charging Hassine with first degree murder, attempted murder, conspiracy, and solicitation.

B. *The Murder Trial*

The State presented thirty-four witnesses at Hassine's trial, including Decker, who had negotiated a plea bargain with the District Attorney to avoid the death penalty. Decker and the other witnesses testified as to the details of the murder conspiracy and described Hassine's extensive involvement in the plot to murder Kellet.

Hassine then took the stand in his own defense and, for the first time since his arrest, offered an innocent explanation for his role in the conspiracy. He testified that he had obtained his father's gun and stored it in the Market after Orlowski had asked him for protection from Kellet. He then claimed that Decker entered the Market on the day of the murder, and, without Hassine's knowledge, took the gun and left the store "ranting and raving, saying he was going to get Skip Kellet." Hassine thus maintained that he never told Decker to kill Kellet, that he never gave Decker a gun with which to carry out the crime, and that he was never part of the murder conspiracy.

Attempting to discredit these claims, the prosecutor asked Hassine a series of questions on cross-examination regarding Hassine's post-arrest silence. In particular, he inquired three times as to why Hassine had not offered the same exculpatory story to the authorities following his arrest. Hassine's attorney objected each time, believing that the questions violated Hassine's rights under *Doyle v. Ohio*, which provides that the government cannot use a defendant's post-arrest, post-*Miranda* silence for impeachment purposes at trial. 426 U.S. at 610. The trial judge agreed, sustaining the objections and preventing

Hassine from answering the prosecutor's questions. The prosecutor also made two general references to Hassine's silence in his closing argument. Nevertheless, the court did not provide curative instructions during Hassine's testimony or in the jury charge.

The case was sent to the jury at the close of all evidence, and on June 11, 1981, the jury found Hassine guilty and recommended that he be sentenced to life in prison on the charge of first degree murder. After denying Hassine's motions for a new trial and arrest of judgment, the court adopted the jury's recommendation and sentenced Hassine to life imprisonment, in addition to several consecutive prison terms extending from two to twenty years.

C. *Review of the State Court Conviction*

Hassine appealed his conviction to the Superior Court of Pennsylvania, assigning fifteen reversible errors to the trial court. *See Commonwealth v. Hassine*, 490 A.2d 438, 443-44 (Pa. Super. Ct. 1985) ("*Hassine I*"). Among other things, he argued that the state prosecutor had violated the due process principles established in *Doyle* by interrogating him on the witness stand about his post-arrest silence. On February 8, 1985, the Superior Court denied Hassine's appeal in its entirety and affirmed his sentence, finding that his list of alleged errors was "short on merit," *id.* at 444, and rejecting his claim of prosecutorial misconduct based on *Doyle*. Relying on state precedent, the court noted that testimony regarding post-arrest silence can be elicited "to refute contrary statements volunteered by the defendant to demonstrate his

cooperation at the time of questioning," *id.* at 451 (quoting *Commonwealth v. Bey*, 439 A.2d 1175, 1177 (1982)), and concluded that "we believe this occurred here. The district attorney elicited testimony designed to rebut [Hassine's] claim that he cooperated with the police, not to suggest [Hassine's] guilt to the jury. Hence we find no error." *Hassine I*, 490 A.2d at 451.

On May 13, 1985, Hassine applied for a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, claiming again, *inter alia*, that the prosecution asked improper questions at trial about his post-arrest silence. On April 15, 1986, however, the state Supreme Court denied the Petition and Hassine's conviction became final.

Hassine chose not to seek a writ of certiorari from the Supreme Court of the United States, but instead filed a petition for a writ of habeas corpus with the district court on October 28, 1986. Among other things, Hassine argued once again that the prosecutor had exploited his post-arrest silence as an impeachment tactic in violation of due process and *Doyle*. The district court referred the petition to a Magistrate Judge for a Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(B), and on June 15, 1988, the Magistrate Judge recommended that relief be denied. After reviewing the record in detail, the Magistrate Judge found strong evidence "that the jury may have impermissibly been able to draw an inference between petitioner's silence and his guilt, thus clearly infringing upon petitioner's due process rights as established in *Doyle*." Nevertheless, he concluded that any constitutional error was harmless, because "[t]he evidence against Hassine was overwhelming."

Hassine filed several objections to the Report and Recommendation, and the district court granted de novo review of the Magistrate Judge's findings consistent with 28 U.S.C. § 636(b)(1)(C). One year later,on November 15, 1989, the district court issued a Memorandum and Order agreeing with the Magistrate Judge's ruling that the jury had been permitted "to draw an impermissible inference of guilt from Hassine's silence" in violation of Doyle and its progeny. *Hassine v. Zimmerman*, No. Civ. A. 86-6315, 1989 WL 140491, at *5 (E.D. Pa. Nov. 15, 1989) ("*Hassine II*"). However, the district court withheld a final decision on Hassine's petition, because it believed that oral argument was needed on the question of whether the trial error had been harmless.

Oral argument was held on December 1, 1989, but the court did not immediately issue a ruling, and no further events transpired in the case for the next three and a half years. On April 21, 1993, the Supreme Court announced its decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), altering the standard for harmless error in habeas cases involving constitutional trial flaws. Prior to Brecht, the Court had held in *Chapman v. California* that habeas relief should be denied in the event of constitutional trial error only if the prosecution could prove that the error was "harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967). In *Brecht*, however, the Supreme Court announced a new test for harmless error in habeas cases, namely, whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). If not, habeas relief should be denied. Realizing the potential impact of the new standard on Hassine's

petition, the district court scheduled a July 29, 1993, conference call to discuss several matters, including "the significance, if any" of the Supreme Court's decision in *Brecht*. Following that call, the parties submitted letter briefs to the district court regarding whether Hassine's claims should be evaluated under *Brecht* or *Chapman* and whether harmless error could be found under either standard. However, two more years passed, and on May 4, 1995, the district court conducted yet another oral argument concerning whether *Brecht* should be applied to Hassine's petition. Still, no decision issued, and the parties filed at least ten additional letter briefs in the ensuing two years.

Finally, on October 30, 1997 – more than eleven years from the date on which Hassine first filed his habeas petition – the district court reached a decision on the merits of the harmless error claim. The court examined the caselaw and the rationales supporting the rule in *Brecht* and concluded that "[t]his court must apply the *Brecht* standard" to Hassine's petition for relief. *Hassine v. Zimmerman*, No. Civ. A. 86-6315, 1997 WL 677152, at *5 (E.D. Pa. Oct. 30, 1997) ("*Hassine III*"). After conducting an extensive review of the record and the evidence supporting the jury's verdict, the court then held that the *Doyle* error at Hassine's trial was harmless, because "the record, considered as a whole, demonstrates that the direct and circumstantial evidence of [Hassine's] guilt was overwhelming." *Id.* at *7. The court determined that "the prosecutor's improper reference to Hassine's post-arrest silence, although a constitutional violation under *Doyle*, did not have a substantial and injurious effect or

influence on the jury's guilty verdict" within the meaning of *Brecht*. *Id.* at *10.

The district court issued a certificate of probable cause allowing Hassine to file a timely appeal, and we now have jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.[1] Because the district court relied entirely on the state court record and did not hold an evidentiary hearing, our review is plenary. *See Johnson v. Rosemeyer*, 117 F.3d 104, 109 (3d Cir. 1997). Acting in the same capacity as the district court, we will presume that the factual findings of the state courts are correct if fairly supported by the record, but we will exercise plenary review over state court conclusions on mixed questions of law and fact and pure issues of law. *See Ahmad v. Redman*, 782 F.2d 409, 412 (3d Cir. 1986).

II. THE *DOYLE* VIOLATION

The Supreme Court established in *Doyle v. Ohio* that it is improper for a prosecutor to cause the jury to draw an impermissible inference of guilt from a defendant's post-arrest silence. 426 U.S. at 610. Doyle involved two defendants who, upon taking the witness stand in their own defense, claimed that a narcotics informant had framed them for the crime. The prosecutor asked each defendant on cross-examination whether he had told the "framing" story to the police after his arrest. Defense

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[1] This case is not subject to the terms of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), because Hassine filed his habeas petition well before the April 24, 1996, date on which the AEDPA took effect.

counsel objected strenuously, arguing that the prosecution could not impeach the defendants on this basis because the defendants were merely exercising their right to remain silent after arrest. However, the objections were overruled and the defendants were compelled to admit that they had not provided an exculpatory story to the authorities following their arrests and the reading of their Miranda rights.

On appeal, the defendants argued that the prosecutor's line of questioning violated the due process guarantees inherent in the right to remain silent. The Supreme Court agreed, reversing their convictions in light of *Miranda's* implicit assurance that silence will have no adverse consequences. The Court stated that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. Therefore, the Court held, "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.

In this case, we believe that the state prosecutor violated the due process principles established in *Doyle* by seeking to elicit testimony about Hassine's post-arrest, post-*Miranda* silence. The record shows that the prosecutor's cross-examination of Hassine proceeded as follows:

Prosecutor: How long have you been sitting in jail, sir?

Hassine: Close to seven months.

Prosecutor: And you have been sitting in Bucks Country Prison?

Hassine: No, sir.

Prosecutor: You were in Bucks County Prison for a time?

Hassine: About a month and a half.

Prosecutor: You were sitting in Holmesburg Prison?

Hassine: For about five months.

Prosecutor: And another prison?

Hassine: Delaware County.

Prosecutor: And conditions are not very good?

Hassine: No, sir.

Prosecutor: You sat for seven months in prison with the knowledge of what was really involved in regard to this gun, and you just kept it to yourself because your attorney said to keep it to yourself?

Hassine's Attorney: Objection.

The Court: Sustained.

Prosecutor: But you kept it to yourself until you came in to a court of law today and said it for the first time, in any event, outside of perhaps your family or your lawyer?

Hassine's Attorney: Objection.

Prosecutor: For the first time?

Hassine's Attorney: That is objected to.

The Court: Sustained.

On three occasions, and over three objections, the prosecutor asked Hassine why he had remained silent about the crime after his arrest and after *Miranda* warnings had been given. It is clear from these questions that

the prosecutor was attempting to elicit the precise inferences that the State is prohibited from exploiting under *Doyle*. Further, the trial court did not provide, and defense counsel did not request, any curative instructions for the jury. In this regard, the instant case is distinguishable from *Greer v. Miller*, 483 U.S. 756 (1987), where the Supreme Court found no *Doyle* violation. In *Greer*, the sequence of events " – a single question, an immediate objection, and two curative instructions – clearly indicate[d] that the prosecutor's improper question did not violate [the petitioner's] due process rights." *Id.* at 766. Here, the prosecutor asked questions concerning the amount of time Hassine had spent in prison, questioned Hassine about the poor conditions he had experienced in confinement, and then, despite objections by the defense, asked three questions that are clearly prohibited by *Doyle*, and then made statements in his closing that could be understood to refer to that same silence. Moreover, the trial court gave no curative instructions at all. We thus find that the government violated Hassine's right to due process under *Doyle*.

In so ruling we reject the State's argument, and the view of the Pennsylvania Superior Court in *Hassine I*, 490 A.2d at 451, that the prosecutor's questions were nonetheless permissible because Hassine had "opened the door" in his direct testimony to inquiries about his post-arrest silence. Hassine had told the jury on direct examination that his attorney had offered to make him "available to the police," by, for example, offering to present his father to the police "in connection with identifying the gun." The State contends that by asking Hassine about his post-arrest silence, the prosecutor was merely challenging Hassine's testimony as to his behavior following

arrest by impeaching Hassine's claim on direct examination that he was "available" and willing to cooperate with the authorities.

The State's argument is based on an exception contained in footnote eleven in *Doyle*, which provides that "post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." 426 U.S. at 619 n.11. As the Supreme Court explained, "in that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." *Id.*

We agree that the State's argument has some allure under *Doyle* as a basis for the prosecutor to use Hassine's post-arrest silence for impeachment. However, we find, as the district court did, that Hassine's direct testimony was far too innocuous and ambiguous to constitute an exculpatory version that would justify the pointed cross-examination in this case. The *Doyle* footnote applies when a witness testifies on the stand to a version of events and indicates that he previously *told* that version to law enforcement. The government can then pursue its position that the story was not previously told, and may bring out on cross-examination the fact that the defendant was silent following arrest. As the one case cited in the *Doyle* footnote makes clear, "to be admissible, keeping silence must be much more than ambiguous. It must appear to be an act blatantly inconsistent with the defendant's trial testimony." *United States v. Fairchild*, 505 F.2d 1378, 1382 (5th Cir. 1975). In this case, however, there is no contention that Hassine described a version of events on the

stand and indicated that he had previously told that same story to the police. Rather, the only testimony which harkens back to Hassine's previous behavior deals with his declaration that he was "available" for further questioning. Hassine did not claim to have told the police an exculpatory story after arrest, did not imply that he had participated actively in the investigation, and never suggested that he had surrendered his right to silence by speaking directly with the authorities. The only relevance of the prosecutor's questioning to Hassine's previous silence, therefore, implicates his right to remain silent more than it constitutes questioning probative of his truth or credibility.[2]

The *Doyle* footnote exception only permits the prosecution to use post-arrest silence to impeach the credibility of the defendant's version of what he did following arrest; the government cannot use the silence to impeach the exculpatory story itself or to draw inferences suggesting the defendant's guilt. *See Doyle*, 426 U.S. at 619 n.11; *United States v Gant*, 17 F.3d 935, 941 (7th Cir. 1994) ("The government may use defendant's silence for the limited purpose of impeaching his testimony; it may

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[2] Hassine's appeal thus differs greatly from *Fairchild*, where the court determined that post-arrest silence was admissible because the defense attorney had specifically asked the defendant if he had "cooperated fully with the FBI and U.S. Attorney's office in responding with anything that you all wanted." 505 F.2d at 1383; *see also Leecan v. Lopes*, 893 F.2d 1434, 1442 (2d Cir. 1990) (emphasis added) (finding that an inquiry into post-arrest silence was warranted where the defendant's testimony "left the *clear implication* that he had proffered his alibi to the police upon surrender").

not argue that the defendant's silence is inconsistent with his claim of innocence."); *Alo v. Olim*, 639 F.2d 466, 468 (9th Cir. 1980) (questions implying that the defendant's silence is substantive evidence of guilt are not permitted under the *Doyle* exception). In the present case, rather than simply asking Hassine if he had told his story to the police after arrest, the prosecutor asked incredulously, "you sat for seven months in prison with the knowledge of what was really involved in regard to the his gun, and you just kept it to yourself because your attorney said to keep it to yourself?" We believe that questions like this clearly invite the jury – in violation of *Doyle* – to reject Hassine's story and to infer that Hassine's post-arrest silence was a sign of his guilt.

Consequently, we conclude that the footnote eleven exception in *Doyle* is of no aid to the State. The prosecutor violated Hassine's right to due process at trial by seeking to draw impermissible inferences about Hassine's post-*Miranda* silence following arrest.

III. HARMLESS ERROR

Having found a violation of Hassine's federal constitutional rights, we turn next to the issue of whether the error at Hassine's trial can be characterized as harmless. The Supreme Court has identified two types of constitutional errors: structural and trial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-10, (1991). "A structural error is a defect in the trial mechanism itself, affecting the entire trial process, and is per se prejudicial." *Yohn v. Love*, 76 F.3d 508, 522 (3d Cir. 1996) (citations omitted). By contrast, "trial error occurs during the presentation of the

case to the jury, and may be quantitatively assessed in the context of all other evidence." *Id.* The Supreme Court has written that "*Doyle* error fits squarely into the category of constitutional violations which we have characterized as trial error." *Brecht*, 507 U.S. at 629 (quotation omitted). Therefore, we must assess whether the *Doyle* violation at Hassine's trial constitutes harmless error in the context of all the evidence presented by the State. The nature of the harmless error inquiry, however, has been modified during the pendency of Hassine's habeas corpus proceedings, as discussed above. For many years, the standard in both direct and collateral appeals for determining whether a constitutional trial error was harmless was the test established in *Chapman v. California*, which held that a conviction would be vacated unless the government could prove that the error was "harmless beyond a reasonable doubt." 386 U.S. at 24. In 1993, however, the Supreme Court held in *Brecht v. Abrahamson*, 507 U.S. at 619, that harmless error in habeas cases should be judged instead by the standard for nonconstitutional errors set forth in *Kotteakos v. United States*. Thus, under *Brecht*, habeas relief can now be granted on collateral review only if the constitutional trial error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776).[3]

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[3] Brecht adopts a more deferential standard on collateral review for cases involving constitutional trial errors. Nevertheless, the degree of the difference in practice remains to be seen as the new test is applied. As Justice Stevens, whose concurrence provided the decisive fifth vote in Brecht, noted, "given the critical importance of the faculty of judgment in

Ordinarily, this would present no problem on appeal, because we would apply the *Brecht* standard to a petitioner seeking habeas relief. In this case, though, Hassine argues that he is entitled to the benefit of the older, more stringent *Chapman* standard because no state court has ever evaluated his claim under *Chapman* on direct review. Before proceeding to an application of the harmless error test, we must therefore resolve the following threshold issue: should a federal court apply the *Brecht* standard for harmless error in a habeas case where the state courts have never conducted a review of the error on direct appeal under *Chapman*? The district court found that Brecht should apply regardless of the actions of the state courts, and we agree.

A. *Whether Brecht or Chapman Should Apply*

The federal courts remain divided as to whether *Brecht* or *Chapman* applies in a situation in which a habeas petitioner has never had his claim evaluated under *Chapman* on direct appeal. The Eighth Circuit, and at least two district courts, have concluded that the "rule announced in *Brecht* does not apply and that the *Chapman* harmless error standard is the appropriate test in this case." *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir.1993); *see also Starr v. Lockhart*, 23 F.3d 1280, 1292 (8th Cir. 1994); *Lyons v. Johnson*, 912 F. Supp. 679, 687-89 (S.D.N.Y. 1996),

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administering either standard, however, [th]e difference [in emphasis] is less significant than it might seem . . . . In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." 507 U.S. at 643 (Stevens, J., concurring).

aff'd, 99 F.3d 499 (2d Cir. 1996); *Rickman v. Dutton*, 864 F. Supp. 686, 712 (M.D. Tenn. 1994), *aff'd sub nom. Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). By contrast, the Fourth, Fifth, Seventh, Tenth, and Eleventh circuits have all held that "*Brecht*, rather than *Chapman*, enunciates the appropriate standard for determining whether a constitutional error was harmless in a federal habeas challenge to a state conviction or sentence," regardless of the standard employed by the state courts. *Hogue v. Johnson*, 131 F.3d 466, 499 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1297, (1998);[4] *see also Sherman v. Smith*, 89 F.3d 1134, 1140-41 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 765, (1997); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041, (1996); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir. 1995).[5] Hassine contends that we should not implement *Brecht* as we normally would, but that we should cling to the old

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[4] A panel of the Fifth Circuit recently noted its disagreement with *Hogue*, but concluded that "we may not ignore the [*Hogue*] decision, for in this circuit one panel may not overrule the decision of a prior panel." *Barber v. Johnson*, 145 F.3d 234, 237 (5th Cir. 1998), *petition for cert. filed*, (U.S. Sep. 10, 1998) (No. 98-6001). *Hogue* thus remains good law in the Fifth Circuit.

[5] Two courts passed on the issue after finding that the trial error would not have been harmless under either standard. *See Lyons v. Johnson*, 99 F.3d 499, 503 (2d Cir. 1996) ("[D]ue to the magnitude of the trial court's error . . . we need not decide whether . . . *Chapman* or *Brecht* is the appropriate standard to apply in this case."); *Hanna v. Riveland*, 87 F.3d 1034, 1038 n.2 (9th Cir. 1996) ("[W]e do not need to decide this issue because, even under *Brecht's* less stringent standard of review, the error cannot be deemed harmless.").

Chapman standard, notwithstanding the new formulation handed down by the Supreme Court. However, we are unwilling to find an exception to *Brecht's* "standard formula," *Tyson*, 50 F.3d at 446, because we disagree with the four arguments that Hassine offers in contending that *Chapman* should apply.

First, the plain language of *Brecht* makes no distinction that requires us to employ *Chapman* on collateral review. The issue in *Brecht* was "whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, in violation of due process under *Doyle v. Ohio*, entitles petitioner to habeas corpus relief." 507 U.S. at 622-23 (footnote and citation omitted). The Court held that "the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.* at 638; *see also id.* at 623 ("[T]he standard for determining whether habeas relief must be granted is whether the *Doyle* error 'had substantial and injurious effect or influence in determining the jury's verdict.' ") (quoting *Kotteakos*, 328 U.S. at 776). The Court never restricted the issues or the holding in *Brecht* to situations where a petitioner has already had his or her claim evaluated by the state courts under *Chapman*. Therefore, we are not persuaded that we should read an exception into *Brecht's* harmless error rule when no such exception is even implicit in the Court's opinion.

Second, in contrast to the views of some courts, we do not believe that we should regard the facts in *Brecht* as limiting the Court's holding to cases in which *Chapman* has previously been applied. Because the Court decided

Brecht after the Wisconsin Supreme Court had already ruled on the harmless error issue under *Chapman*, several courts have viewed prior *Chapman* review as integral to *Brecht's* result.[6] We disagree.

While the Court noted that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review," 507 U.S. at 636, its holding was based primarily on a finding – apart from the particular facts or history of the case – that "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review." *Id.*

In *Brecht*, the Court identified four considerations in justifying the application of a more relaxed harmless error standard for habeas petitions, including the States' interests in the finality of convictions, comity, federalism, and the recognition that "liberal allowance of the writ degrades the prominence of the trial itself." *Id.* at 635

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[6] For example, the Eighth Circuit has written that *Brecht* was "based largely on the notion that because the state courts can properly apply the *Chapman* harmless error standard on direct review, the federal habeas courts need only review those decisions under the *Kotteakos* harmless error standard." *Orndorff*, 998 F.2d at 1430. Likewise, the district court in *Lyons* stated that *Brecht* "was premised largely on respect for the actual, conscientious review of harmlessness performed by four prior courts – both federal and state – that applied *Chapman*." 912 F. Supp. at 689. These courts thus believe that *Brecht* intended to alter the harmless error standard only for those habeas cases which, like *Brecht*, involved a previous application of *Chapman* on direct appeal.

(quoting *Engle v. Isaac*, 456 U.S. 107, 127 (1982)). The Court then reasoned comprehensively that:

> overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a reasonable possibility that trial error contributed to the verdict, is at odds with the historic meaning of habeas corpus – to afford relief to those whom society has grievously wronged. Retrying defendants whose convictions are set aside also imposes significant social costs, including the expenditure of additional time and resources for all the parties involved, the erosion of memory and dispersion of witnesses that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of society's interest in the prompt administration of justice.

507 U.S. at 637 (citations and quotations omitted). This analysis led the Court to conclude that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id.* at 637; *see also id.* at 637-38 ("The *Kotteakos* standard is . . . better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases."). Thus, *Brecht* was clearly not premised on the notion that the state courts had already conducted a *Chapman* review of harmless error on direct appeal. The fact that the state

courts may or may not have performed such a review was of minor importance to the Court's view that the *Kotteakos* standard should be applied consistently in collateral proceedings.

Third, contrary to Hassine's argument, we believe that the policy interests identified in *Brecht* are nonetheless implicated in cases where the state courts have not evaluated a petitioner's claim under *Chapman*. Hassine urges that we follow *Lyons*, in which a district court stated that *Brecht* should be used only when federal courts would be repeating *Chapman* analyses performed by the state courts, because it is only in these situations that the federal courts demonstrate a "lack of respect for state courts' ability as federal constitutional interpreters, and hence . . . violate obligations of comity and principles of federalism." 912 F. Supp. at 689; *see also Barber*, 145 F.3d at 238 (Dennis, J., concurring) (stating that the federal courts cannot defer "to the systemic values of finality, federalism, and comity . . . unless there has in fact been a good-faith State effort to protect constitutional rights by applying the *Chapman* standard").

Once again, however, we disagree. Finality, comity, and federalism do not turn on whether the state courts have performed a *Chapman* analysis, but depend, rather, on the fact that they have rejected a defendant's direct appeal. Indeed, a federal habeas court which overturns a state conviction on collateral review still upsets a State's interest in finality, and still raises federalism, comity, and trial process concerns, regardless of whether the state courts have previously identified the constitutional error or have performed a *Chapman* analysis on direct appeal.

In light of the Court's reasoning and holding in *Brecht*, it is anomalous to say that a *Chapman* standard should apply in *any* habeas case based on concerns such as federalism, comity, or finality. *Brecht* stands for the proposition that these concerns are to be advanced by employment of the *Brecht* standard itself. Thus, not to apply *Brecht*, and to apply instead a less deferential standard, is to nullify not merely the policies that the Court has advanced, but the very import of the *Brecht* decison. In fact, the Supreme Court has repeatedly emphasized the importance of deference to State "sovereignty over criminal matters," *Brecht*, 507 U.S. at 637, and to the finality of criminal judgments, outside the context of *Chapman*. In *Teague v. Lane*, for example, the Court restricted the ability of habeas petitioners to establish new constitutional rules on collateral review, in part because the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. 288, 309 (1989). Likewise, in *Wright v. West*, the Court stressed the "significant costs" of habeas review. 505 U.S. 277, 293 (1992) (quoting *Engle*, 456 U.S. at 126). "Among other things," the Court wrote, "it disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Wright*, 505 U.S. at 293 (quotations omitted).

Therefore, while the absence of a state court *Chapman* review may make the considerations identified in *Brecht* less compelling, it certainly does not eliminate them. As

our sister circuits have concluded, *Brecht* is still the general rule to apply in habeas cases, even in situations where the state courts never employ *Chapman*, because "principles of federalism, comity, and finality apply regardless of the harmless error standard used by the state court." *Sherman*, 89 F.3d at 1141; *see also Tyson*, 50 F.3d at 446 ("The reasons the Court gave in *Brecht* for adopting a less stringent rule are independent of the rule applied in the state appellate process.").[7]

Finally, we note that we are wary of the practical impact of applying *Chapman* to every case where a prior *Chapman* review has not occurred. As the Seventh Circuit recognized in *Tyson*, "ordinarily . . . the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless error. *Brecht* itself was a fluke in this regard; the state courts had considered the issue of harmless error and applied the *Chapman* standard." 50 F.3d at 446.[8] Consequently, any rule requiring *Chapman* to be used when the state courts

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[7] We do not mean to imply that habeas relief should be limited in the name of federalism and comity alone. We note merely that Supreme Court jurisprudence requires us to consider the systemic costs of applying certain standards on collateral review, and that, in this case, those costs are substantial even if the state courts never perform a *Chapman* analysis on direct appeal.

[8] The state courts may not use *Chapman* to evaluate harmless error on direct appeal if, as here, they conclude that there was no constitutional error and thus do not perform the harmless error analysis at all, if they find that the petitioner has defaulted procedurally on his claim, or if there is no opportunity to address the error because it is discovered only after the defendant has already exhausted his state appeals.

fail to address harmless error would render *Brecht* inapplicable to the majority of habeas petitions and would "rob the decision of any general significance." *Id.* Given the substantial interests identified in *Brecht*, and given the reasoning of the opinion, we find it highly unlikely that the Supreme Court could have sanctioned such a result.

Cases like *Brecht* and *Teague* express the Court's belief that collateral review entails heightened deference and respect to the state courts, and we must follow governing precedent when it applies, as it does here. Accordingly, we hold that a federal habeas court performing a harmless error inquiry on collateral review must employ the standard for harmless error articulated in *Brecht*, even if the state courts have never reviewed the error on direct appeal under *Chapman*.

B. *Whether Brecht Should be Applied to Hassine*

Even if *Brecht* applies generally to collateral proceedings, Hassine contends that we should still review his claims under *Chapman* due to the unique and unusual facts of his case. In particular, he argues that *Chapman* review is appropriate here because (1) he forfeited the right to pursue an appeal in the Supreme Court when *Chapman* was still the law for harmless error on collateral review, and because (2) the district court proceedings were marked by such extensive delay as to violate his right to due process.[9] We are not persuaded by either contention.

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[9] Hassine also argues that his appeal is different because no state court has ever conducted a *Chapman* review of his claims.

First, the fact that Hassine made the deliberate choice to forego seeking relief in the Supreme Court is irrelevant. Hassine could not, of course, have anticipated an intervening change in the law, but that alone is insufficient to prohibit a retroactive application of *Brecht* on collateral review. Hassine made a tactical decision to bypass the Suprme Court and to proceed to the district court for habeas relief, and we will not reward that decision by employing a less stringent standard when reviewing his petition.

Second, while we agree that Hassine experienced excessive delay in the processing of his petition, we do not believe that he is entitled to habeas relief, including any altered standard for harmless error, even if the delay in the district court gave rise to a violation of his due process rights.[10] In *Heiser v. Ryan*, 951 F.2d 559, 563 (3d Cir. 1991) ("*Heiser I*"), we acknowledged that a delay in certain collateral proceedings can violate a prisoner's fundamental right to due process. We reviewed the claim of a petitioner whose state action for post-conviction relief had been pending for nearly four years, and we stated that "delays in post-verdict process may violate the Due Process Clause. . . . The due process clause

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As we discussed above, however, we believe that this does not alter our analysis in determining whether *Brecht* applies.

[10] While we certainly do not condone the extraordinary delay in processing Hassine's petition, we wish to make clear that we are not holding that the delay constituted a violation of due process. We hold merely that Hassine would not be entitled to relief through habeas corpus proceedings *even if* the delay did amount to a constitutional violation.

protects against more than delay in trial and sentencing. It guarantees as well the right to attack a conviction." *Id.*

After *Heiser I* was remanded to the district court, however, we clarified our earlier remarks by revisiting the due process issue in a subsequent appeal. *See Heiser v. Ryan,* 15 F.3d 299 (3d Cir. 1994) ("*Heiser II*"). In Heiser II, we still recognized that excessive delay in state collateral proceedngs could violate due process, but we made clear that while the defendant could seek damages against counsel responsible for the delay, a writ of habeas corpus was not the proper remedy in such a case. *Id.* at 307. In other cases, we have indicated that petitioners experiencing delay can seek a writ of mandamus to compel the district court to reach a decision on the habeas claim. For example, in *Madden v. Myers,* we addressed a petitioner's argument that mandamus was warranted where seven months had elapsed since the filing of the Magistrate Judge's Report and Recommendation without any action by the district court. 102 F.3d 74, 76 (3d Cir. 1996). We ultimately denied the request, but, in our only published opinion on this issue, we noted that the petitioner's claims of delay had "force" and were "of concern." *Id.* at 79. Moreover, we stated that "although this delay is of concern, it does not yet rise to the level of a denial of due process," implying that at some point, delay by the district court could become so excessive as to warrant the issuance of a writ of mandamus. *Id.* (emphasis added).[11]

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[11] In fact, a review of our unpublished opinions reveals that we routinely entertain mandamus petitions complaining of extraordinary delay in habeas corpus proceedings at the district court level.

We are not alone in entertaining writs of mandamus due to extraordinary federal delay. *See, e.g., Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (granting a writ of mandamus after a fourteen-month delay by the district court); *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970) (granting a writ of mandamus where the district court had delayed its habeas ruling pending a decision by the Supreme Court).[12] However, while we have shown a willingness to issue writs of mandamus and to entertain lawsuits for damages, we have never granted *habeas* relief because of a delay in the processing of a petition, and we decline to do so here. The federal courts are authorized to provide collateral relief where a petitioner is in state custody or under a federal sentence imposed in violation of the Constitution or the laws or treaties of the United States. 28 U.S.C. §§ 2254, 2255. Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's *collateral* proceeding does not enter into the habeas calculation. We have often noted the general proposition that habeas proceedings are "hybrid actions"; they are "independent civil dispositions of completed criminal proceedings." *See, e.g., Santana v. United States*, 98 F.3d 752, 754 (3d Cir. 1996). Federal habeas

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[12] We hasten to add that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 402 (1976). Thus, a habeas petitioner seeking mandamus in these cases must experience extraordinary delay, "must have no other adequate means to obtain the desired relief, and must show that the right to issuance is clear and indisputable." *Madden*, 102 F.3d at 79.

power is "limited . . . to a determination of whether there has been an improper detention by virtue of the state court judgment." *Henderson v. Frank*, No. 97-3041, 1998 WL 456254, at *9 (3d Cir. Aug. 6, 1998). As the Seventh Circuit has noted, "[d]elay in processing [a] collateral claim does not make the continued imprisonment of the defendant unlawful, and hence, does not warrant federal habeas corpus relief." *Montgomery v. Meloy*, 90 F.3d 1200, 1206 (7th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 266 (1996); *see also Jackson v. Duckworth*, 112 F.3d 878, 880 (7th Cir.) (stating that "federal habeas corpus cannot remedy a delay in state collateral proceedings because such an error has absolutely nothing to do with the reason for a defendant's confinement"), *cert. denied*, ___ U.S. ___, 118 S. Ct. 380 (1997).[13]

Therefore, to the extent that a petitioner wishes to claim that delay in the processing of a collateral petition violates due process, we hold that the petitioner's remedy, if any, is through such avenues as a lawsuit for damages or a writ of mandamus rather than through the habeas corpus proceeding itself. In the case at bar, we thus conclude that *Brecht* still applies in evaluating whether the *Doyle* violation at Hassine's trial constituted harmless error.

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[13] Providing relief to a petitioner in state custody because of a delay in the federal courts would also greatly undermine principles of federalism and comity by disturbing a *state* court judgment due to a *federal* court error.

C. *Application of the Brecht Standard for Harmless Error*

Having found that *Brecht* applies to Hassine's petition, we proceed next to an examination of whether the district court properly concluded that the prosecution's Doyle violation was harmless.[14] Under *Brecht* and its progeny, a constitutional trial error is not harmless if the court is in "grave doubt" as to whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). "Grave doubt" exists when, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435. Moreover, it is "inappropriate to ask whether there was sufficient evidence to support the result, apart from the phase of the trial affected by the error. The correct inquiry is whether the error had a substantial influence on the verdict despite sufficient evidence to support the result apart from the error." *Yohn*, 76 F.3d at 523 (citations omitted).

Hassine contends that the *Doyle* violation could not have been harmless because it went to the heart of his defense. He maintains that because he was the only witness testifying as to his version of the events, and because

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[14] The district court also evaluated Hassine's claim under *Chapman*, stating in a footnote that "the record establishes sufficient evidence of Hassine's guilt to suggest that the *Doyle* error would have been harmless under the *Chapman* reasonable-doubt standard as well." *Hassine III*, 1997 WL 677152, at *10 n.8. However, we need not reach this issue because we have determined that *Chapman* does not apply.

the *Doyle* error undermined his credibility, it necessarily had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776). In evaluating Hassine's claim, we must thus determine whether, and to what extent, the jury's decision to accept the State's version of the facts rather than Hassine's was influenced by the prosecutor's *Doyle* violation. If the jury disbelieved Hassine and convicted him because of the *Doyle* violation, the error was not harmless and we will grant the petition. The crucial inquiry is the "impact of the error on the minds of the jurors in the total setting." *Yohn*, 76 F.3d at 523 (citing *Kotteakos*, 328 U.S. at 764). While the nature of the evidence against Hassine is important, we must also examine the phases of the trial affected by the error, and determine whether the error had a substantial influence on the verdict despite sufficient evidence to support the result apart from the error. *See id.* (citing *Kotteakos*, 328 U.S. at 765). In so doing, we must of necessity weigh the impact of evidence on the jury and cannot help but make a judgment as to how the jury would reasonably perceive Hassine's version of events with and without the *Doyle* violation.

At the outset, we note our agreement with the district court's finding that the evidence, as mounted through a parade of Commonwealth witnesses, was substantial indeed. The witnesses testifying as to Hassine's planning of, and intent to commit, the crime were numerous, and their stories consistent.[15] A number of witnesses testified

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[15] The Commonwealth put 34 witnesses on the stand. Among those witnesses central to the Commonwealth's case

to an initial meeting in which Hassine called for Kellet's execution. (N.T. 34, 111-12, 743-44, 756-57, 810, 822).[16] Several witnesses also recalled that Hassine had actively searched for a weapon to carry out his plan: at the initial meeting, he demanded that the other employees try to procure a weapon (N.T. 36, 744, 774); he had discussed buying a .357 with Breed members Tuite and Schwab (N.T. 56-59, 555-57, 626-27); he asked his employee Ron Wharton to buy a gun and to participate in the plan to kill Kellet (N.T. 747, 760); and he visited his tenant Theodore Camera and asked Camera to find him a gun. (N.T. 485-86, 487-88, 490).

Hassine settled on a weapon for the shootings: a stolen .25 caliber automatic handgun. (N.T. 933). Both Decker and Wharton testified that Hassine gave Decker the .25 while the three were in the Market van. (N.T. 53, 749).[17] Hassine and Decker also went to a gun store where Hassine bought a box of ammunition and signed for the purchase. (N.T. 59-60, 708-10).

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were: 1) Eric Decker, a sometime employee of Hassine's who shot the Kellets, Sofield, and Puerale; 2) Greg Orlowski, the manager and day-to-day owner of the Market; 3) Ron Wharton and Billy Hayes, employees a the Market; 4) Valerie Lynch, Decker's girlfriend; 5) Ron Tuite and Joseph "Critter" Schwab, members of the Breed motorcycle gang; and 6) Theodore Camera, a tenant of the Hassine family and a former classmate of Hassine's.

[16] Ron Wharton recalled Hassine stating that, "He wanted him wasted. He had to set an example." (N.T. 744).

[17] Decker testified that Hassine handed him the gun and stated "here, hit him in the head and leave it there." (N.T. 53).

After buying the bullets, Decker and Hassine drove by Kellet's house, where Hassine told Decker to shoot him then and there with the .25. (N.T. 61). Decker declined because it was daytime, and a witness was present. (N.T. 61-62). Hassine and Decker repeatedly test fired the gun into the back wall of the store, but the .25 was malfunctioning and had to be put aside, despite their attempts to fix it. (N.T. 58-60, 62-63, 750-52, 811-12).[18]

Hassine and his co-defendant Orlowski also met with Breed members Tuite and Schwab to discuss killing Kellet. After bailing Tuite out of jail on a gun charge involving the .357, Hassine contacted him about a "deal" involving Kellet, and the four met to discuss a contract killing. (N.T. 557, 560, 560-61, 562, 627, 630, 753-55).[19] Tuite and Schwab's asking price of $1500 was too high, however, so the four agreed instead that they would beat Kellet up for $500 ($250 credit for the bail and $250 for the beating). (N.T. 560-62, 563, 628-629, 632).[20] Rather

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[18] The .25, a spent shell, and photos of the holes in the Market wall were entered into evidence. (N.T. 51-52, 792-97, 800-01).

[19] Both Tuite and Schwab testified that Hassine appeared upset and angered by the challenge Kellet posed to his authority. Tuite: "Hassine was pissed off – pissed off that somebody would step on his toes." (N.T. 563). Schwab: Hassine was "ruffled because somebody messed with one of his boys." (N.T. 628).

[20] Schwab mentioned that Orlowski and Hassine wanted to continue to consider the possibility of killing Kellet for money: "They were haggling back and forth about the fifteen hundred bucks, so I took the two fifty. They wanted a night to think about if it was worth fifteen hundred bucks to waste Kellet." (N.T. 629-30).

than attack Kellet, as agreed, however, Tuite and Schwab decided to warn Kellet that Hassine and Orlowski wanted to kill him and kept the $250. (N.T. 566, 630).[21]

The Commonwealth also presented evidence of Hassine's conduct both at and after the incident that pointed to his guilt. On the night of the shootings, Decker testified that he met Hassine at the market and said, "Tonight's the night – this cat has got to go. We'll use your gun. I want two hundred and fifty dollars." (N.T. at 77, 218-19). Hassine agreed and said he would come back to pick Decker up with his car. *Id.* Decker further testified that Hassine then drove him to Trenton and retrieved the .380 Llama handgun used in the shootings from his parents' house; gave him directions to Kellet's house; told him that he would wait for him and drive him away after the shootings; and gave him a Yankees batting helmet to disguise himself during the shootings. (N.T. 83-85, 87-88).

Hassine then went to Orlowski's house, where Hassine and Orlowski met a third person, Michael Thompson ("Thompson"), who testified that all three got into his car. (N.T. 861-63). Hassine was carrying a metal pipe. (N.T. 870). Hassine told Thompson to drive to the parking lot across the street from Kellet's residence and then to other locations; Hassine whistled out the window from time to time, and at one point Hassine told Thompson to get out of the car and call for "Eric". (N.T. 863-870, 874-884,

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[21] Hassine later complained that Tuite and Schwab had "ripped him off." (N.T. 755).

905-07).[22] In the course of their drive, they heard two shots, and Hassine stated, "Oh shit, that's my father's gun, I hope that asshole doesn't get caught." (N.T. 868-69, 881, 1224).

After the murder, when Hassine and Orlowski returned from their attempts to find Decker, Hassine told Orlowski that they still had to find Decker, because he was afraid Decker would be arrested. (N.T. 1227-28). The following morning, Hassine told his employee Wharton to drive the pair to Decker's apartment, so they could try once again to retrieve the .380 from Decker. (N.T. 761). When they realized Decker had been arrested, Hassine told Decker's girlfriend, Valerie Lynch, to get rid of the gun. (N.T. 761-63, 1043-44, 1046-47). As word spread that the case against Hassine was building, Tuite and Schwab decided to try to intimidate Hassine into giving them $10,000 to kill Commonwealth witnesses, and Hassine considered their demands but did not ask them to follow through on the plan.[23] (N.T. 568, 572, 577-78, 631-32).

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[22] In the course of their drive, the three went to the Dunkin' Donuts, where Hassine mentioned that they had been seen. (N.T. 867).

[23] Schwab testified as follows:

> He was all frazzled; he was confused – "I can't think – I don't know what to do" – imbalanced – all that shit, and he walked around. He said he would talk to his old man to see if he could come up with some bucks.
>
> Q: Did you talk to him any more after that, Mr. Schwab?
>
> A: Yeah – one more time. . . . I told him the pressure was coming down on him. And he said he would try again to get the money. I told him I would take a van

Not only did the Commonwealth's case present evidence of Hassine's guilt but also evidence of both a coverup and instances of lying that detracted from Hassine's credibility. On the night of the shootings, Hassine told his co-defendant Orlowski to keep his "mouth shut" if the police questioned him. (N.T. 1228). Hassine's attempts to influence others continued as the investigation intensified. After Decker was arrested for the shootings, Hassine tried to make Orlowski sign a statement holding him responsible for the crimes, and the two held practice sessions in which Hassine and Orlowski practiced Orlowski's story. (N.T. 1388-90). Valerie Lynch testified that Hassine told her to lie about his and Decker's whereabouts the night of the shootings, saying: "Remember, Valerie, I was in New York, and Eric Decker was at home." (N.T. 764-65, 1051-52). In the course of an intercepted phone conversation, Hassine queried Thompson about what Thompson had told the police during questioning, and in the course of that conversation the two agreed, ostensibly, that they would keep each other out of the case.[24] (N.T. 892-94, 901).

Hassine had made promises to Decker as a part of his agreement to kill Kellet – an apartment, money, and a future on "easy street" – and he continued the practice of

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load of steaks – pack the van with steaks and give me five grand. (N.T. 631-32).

[24] V: So, as far as they're concerned, you know, you were with somebody else that night, right?

M: Yeah, as far as they're concerned I wasn't even with you.

V: You weren't.

M: Yeah. (N.T. 901).

offering money or services for cooperation from others after the shootings had taken place. (N.T. 63, 111, 752-53, 773). In the course of the conversation in which he urged her to lie, Hassine also promised Lynch that he would help her and her child out with money, cuts of meat, or anything else she needed. (N.T. 1052). Hassine also promised Thompson, in the course of their intercepted phone conversation, that Thompson should look into buying Kellet's house, and that the two could enter into a deal whereby Hassine would put up the money for the house and the surrounding property, and Thompson could keep the house while Hassine developed the lot. (N.T. 896-97, 897-900). In his own testimony, Hassine admitted that he had no intention of buying the house or developing the lot, but he was making the promise because he wanted to know what Thompson told the police. (N.T. 1563-64).[25]

Notwithstanding the weight of the evidence presented by the prosecution, we would have little difficulty finding that the *Doyle* violation had substantially influenced the jury if, apart from the violation, the phase of

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[25] The weaknesses of the Commonwealth's witnesses were exposed in the coure of both direct and cross-examination. Decker was cross-examined on his frequent use of methamphetamine, prior record, shifting stories, and his cooperation with the Commonwealth. (N.T. 116-17, 130-32, 132-35, 136, 138, 215). Other witnesses were questioned about their prior denials to the police, changes in accounts, drug usage, conflicts with Hassine, bias in favor of Orlowski, or reluctance to testify. (N.T. 569-70, 632-33, 769-71, 784-86, 787-88, 789, 789-90, 872, 903, 963-64). As such, the jury had ample opportunity to consider the credibility and relative sophistication of the Commonwealth's witnesses.

the trial most directly impacted, namely, Hassine's testimony, presented a strong counter to the state's evidence. But that is not the case. Hassine's story was undermined not only by evidence of his disregard for the truth, but by his own testimony in which he set forth strained and unrealistic explanations for his conduct and portrayed himself as a mild mannered store manager and law student – a portrayal strikingly at odds with other evidence depicting his behavior as controlling, crude, and vulgar. In the course of his testimony, Hassine portrayed himself as a diligent law student who spent the bulk of his summer studying for the New Jersey and New York bar exams, which he did not pass. (N.T. 1436-38, 1450-52). Hassine also presented himself as a sophisticated individual versed in business practices who was concerned about the management of the market. Hassine testified that he made Orlowski run the store efficiently, and that he had threatened to close the store if Orlowski did not run it in a cost-effective manner. (N.T. 1414-1422, 1492-93). He also testified that he was aware of the drug dealing at the store after Kellet had beaten and stolen money from Orlowski, but that he never participated in or profited from the drug dealing. (N.T. 1424, 1510).[26] He testified that when Wharton took $40 from the register to front a drug deal, he punched him, but did so because he wanted nothing to do with Wharton's activities. (N.T. 1426-27, 1492-93).

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[26] Wharton had testified that Hassine insisted that the drugs be "cut" to increase profits. (N.T. 780-81). Hassine also referred to Thompson as "Mr. Reds" in his testimony and in the course of the recorded conversation played for the jury. (N.T. 1470, 1507-08).

Hassine denied having any feud with Kellet, having any animosity toward Kellet, or saying that he wanted Kellet killed or "wasted," claiming instead that he had only wanted Kellet to be put in jail. (N.T. 1428-29, 1432-34, 1496, 1497-98, 1500, 1553).[27] Hassine also testified that by saying he wanted to make an "example of Kellet," he meant that any time Kellet made any motion toward him or any contact with him the police should be called. (N.T. 1429).

Hassine also testified that he had, in fact, rebuffed Tuite and Schwab's offer to kill Kellet for him by indicating that the situation with Kellet was being handled by the police. (N.T. 1455-59). Hassine claimed to have no idea why Tuite and Schwab would think he would want Kellet killed. (N.T. 1455, 1492).

Hassine admitted that he had engaged in a complex course of behavior involving guns, but testified that his search for a weapon was undertaken in order to find adequate protection for the store. He conceded that he had contacted Camera about obtaining a gun, even though he knew he could purchase a gun legally; that he had bought bullets and signed the register at the gun store because Decker had asked him to do so, even though he knew that Decker was on probation for a gun charge; and that he had shot up the wall of the store with Decker because Decker wanted to demonstrate problems with the gun and he just got "carried away" in the

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[27] Kellet himself testified to the pattern of escalating threats and harassment between himself, Orlowski, and Hassine prior to the shootings, as well as prior tensions between himself and Hassine. (N.T. 382-83, 394-99).

process. (N.T. 1430-31, 1436, 1445-46, 1449-50, 1549-52, 1553, 1556-58). Hassine also explained his conduct on the night of the shootings as being motivated by his desire to get his father's gun back and to prevent a crime from occurring. (N.T. 1466-68, 1526-29, 1521-32).

Hassine's version of events was further undercut by evidence that he was not the mild-mannered person he portrayed himself to be. There was testimony as to his threatening and controlling Orlowski, his need to be a boss of others and his desire to protect his turf and his authority, even if doing so entailed resort to violence. (N.T. 488-89, 490, 555, 563, 628, 755, 783, 861-62, 816, 1051, 1441, 1454-55). Other evidence, some of which was conceded in Hassine's own testimony, demonstrated that Hassine had violent tendencies, through incidents such as his pulling Orlowski's finger out of its socket during an argument and punching Wharton, and through his practices of engaging in threats and feuding. (N.T. 382-83, 1498, 1508, 1556).

The *Doyle* violation ocurred as a series of three questions in the midst of Hassine's testimony, and, later, in two ambiguous references to Hassine's silence in the prosecutor's closing argument. (N.T. 1543-1544, E.H. 223, 259-60). Based on our assessment of the trial evidence, we conclude that the questions posed in the midst of Hassine's testimony did not have a substantial or injurious effect on the jury's verdict. Nor did the two ambiguous references made to a general pattern of silence result in an overemphasis on this silence that destroyed the jury's ability to look at the evidence in the case, as Hassine contends. Rather, these statements were couched within a general framework of asking the jury to consider the

credibility of the witnesses as a whole, and as such, the closing provided the jury with ample latitude to evaluate Hassine's credibility and the evidence of his guilt apart from those particular statements.

While not minimizing the importance of the right at issue or condoning the prosecutor's conduct, we find that the actual effect of the *Doyle* violation on Hassine's credibility before the jury and the inferences drawn by that jury, and on the jury's determination of guilt or innocence, was minimal, as the improper questions and statements occurred within a contextual presentation of a story that was, on its own, not likely to be viewed as credible. Given the overwhelming evidence of Hassine's guilt, and his lack of credibility apart from the *Doyle* violation, we conclude that the constitutional error at Hassine's trial was harmless; there is little doubt that the prosecutor's *Doyle* violation did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776).

D. *The Footnote Nine Exception to Brecht*

Hassine's final agument is that even if the *Doyle* error did not substantially influence the jury, he is still entitled to relief under an exception to the harmless error rule noted in *Brecht*. In footnote nine of the *Brecht* opinion, the Supreme Court stated:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial

> misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. *Cf. Greer v. Miller*, 483 U.S. 756, 769, 107 S. Ct. 3102, 3110, 97 L. Ed. 2d 618 (1987) (Stevens, J., concurring in judgment).

507 U.S. at 638 n.9. Hassine contends that this case fits squarely within the Footnote Nine exception, because the state prosecutor committed a "deliberate and especially egregious error" at trial. He argues that "it was nothing other than deliberate for the very experienced prosecutor to persist in pointedly cross-examining Hassine about his post-arrest silence," and maintains that it was "anything short of deliberate" and egregious when the prosector commented on Hassine's post-arrest silence during closing arguments. (Pet'r Br. at 34 n.14.)[28] However, after reviewing the origins of the Footnote Nine exception and the few cases in which it has been applied, we conclude that the prosecutor's Doyle violation did not rise to the level needed to warrant habeas relief.[29]

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[28] Hassine does not contend that the error falls within Footnote Nine's prohibition on errors "combined with a pattern of prosecutorial misconduct." *Brecht*, 507 U.S. at 638 n.9. He argues only that the *Doyle* violation was sufficiently "deliberate and . . . egregious" to warrant habeas relief. We will thus limit our analysis to this aspect.

[29] It is worth noting that *Brecht* does not truly establish an exception for "deliberate and especially egregious errors;" it merely "does not foreclose the possibility" that such an exception could exist. 507 U.S. 638 n.9. Nevertheless, for purposes of this discussion, we will assume *arguendo* that Footnote Nine does support awarding habeas relief for egregious errors in an appropriate case.

As the citation in Footnote Nine acknowledges, the exception to *Brecht's* harmless error standard has its roots in the views of Justice Stevens, who has written on several occasions that habeas petitions should be granted where trial errors are truly extraordinary, even if they are found to constitute harmless error. *Brecht* itself cites to Justice Stevens' concurrence in *Greer v. Miller*, 483 U.S. at 767, which, in turn, refers to the Justice Stevens dissent in *Rose v. Lundy*, 455 U.S. 509, 538 (1982). In *Rose*, Justice Stevens argued that there are at least four types of constitutional error:

> The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. . . . The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. . . . A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. . . . The fourth category includes those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.

Id. at 543-44 (dissenting opinion) (citations and footnote omitted).

It is, of course, this fourth category that the Court referenced eleven years later in *Brecht* as a potential exception to the harmless error standard. Justice Stevens

has admitted that "[t]his category cannot be defined precisely," *id.* at 544, but his opinions in *Rose* and *Greer* do provide some guidance as to which infractions are to be considered 'fundamentally' unfair. In *Rose*, Justice Stevens explained that the "error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus – that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Id.* (footnotes omitted). In his view, "errors of this kind justify collateral relief no matter how long a judgment may have been final and even though they may not have been preserved properly in the original trial." *Id.* (footnotes omitted). Further, in *Greer*, Justice Stevens applied these principles to *Doyle* violations, writing that "there may be extraordinary cases in which the *Doyle* error is so egregious, or is combined with other errors or incidents of prosecutorial misconduct, that the integrity of the process is called into question. In such an event, habeas corpus relief should be afforded." 483 U.S. at 769 (concurring).

Brecht itself sheds light on the Footnote Nine exception as well. *Brecht* involved a petitioner convicted of first-degree murder and sentenced to life imprisonment. The petitioner took the stand at trial and admitted that he had fatally wounded his brother-in-law, Roger Hartman, but he claimed that the killing was accidental. Over the objections of defense counsel, and in violation of *Doyle*, the State asked the petitioner on cross-examination and again on re-cross-examination "whether he had told anyone at any time before trial that the shooting was an

accident, to which petitioner replied 'no.' " 507 U.S. at 625. The prosecutor then made three glaring references to the petitioner's pre-trial silence during closing arguments, urging the jury to " 'remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence,' " stating that " '[h]e sits back here and sees all of our evidence go in and then he comes out with this crazy story,' " and reminding the jury that the petitioner " 'didn't say' " this was an accident, " '[n]o, he waited until he hears our story.' " *Id.* at 625 n.2 (quoting the record in the case). Nevertheless, the Supreme Court still applied a harmless error standard, so that the facts in *Brecht* did not involve "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct" as reflected in Footnote Nine. *Id.* at 638 n.9. As the Court wrote, "we, of course, are not presented with such a situation here." *Id.*[30]

With this in mind, we too conclude that we are not here presented with the type of egregious situation alluded to in Footnote Nine. First, the error in this case

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[30] We are aware of only two federal circuit court opinions discussing the Footnote Nine exception in detail, but neither of these cases is helpful to our discussion. We addressed the Brecht exception in *Robinson v. Arvonio*, 27 F.3d 877, 886 (3d Cir. 1994), but *Robinson* was later vacated on appeal to the Supreme Court and is no longer good law. *See Robinson v. Arvonio*, 513 U.S. 1186 (1995). In addition, the Ninth Circuit discussed Footnote Nine in *Hardnett v. Marshall*, 25 F.3d 875, 879-81 (9th Cir. 1994), but, in contrast to the instant case, *Hardnett* involved an error that was ultimately found to be irrelevant to the jury's verict. We will thus limit our analysis to Supreme Court precedents discussing the Brecht exception.

was much less egregious than in *Brecht* where the Court did employ a harmless error analysis. At Hassine's trial, objections were immediately raised and sustained, Hassine never answered the improper questions, and the prosecutor's references to Hassine's silence during closing arguments were ambiguous. *See supra.* Therefore, if the Supreme Court believed that *Brecht* was not "of course" a Footnote Nine case, we fail to see how Hassine's case could possibly qualify under the *Brecht* exception.

Second, we do not believe that the prosecutor's actions here were "deliberate and especially egregious" within the meaning of Footnote Nine. As we discussed *supra,* there was some evidence that Hassine had opened the door to questions about his post-arrest silence by testifying that he was "available" for questioning by the police. In fact, this is precisely what the Pennsylvania Superior Court found on direct appeal of Hassine's claim. *See Hassine I,* 490 A.2d at 451. Thus, while we now disagree with the Superior Court and find that the questions were inappropriate, we cannot say that the prosecutor's actions were so deliberate and egregious as to warrant habeas relief that bypasses harmless error scrutiny.

Finally, we conclude that the *Doyle* violation did not "so infect the integrity of the proceeding," *Brecht,* 507 U.S. at 638 n.9, or "call[ ] into question" the integrity of the trial process, *Greer,* 483 U.S. at 769 (Stevens, J., concurring), so as to warrant the grant of habeas relief to Hassine. As we have discussed, the *Doyle* violation in this case consisted of three unanswered questions, occupying just one page in a transcript of more than 1500 pages of testimony, in addition to two ambiguous references to

Hassine's silence during closing arguments. Moreover, the State called thirty-four witnesses on its behalf and impeached Hassine's testimony on several different grounds. Under these circumstances, we do not believe that Hassine's case can be classified as the "unusual," *Brecht*, 507 U.S. at 638 n.9, or "extraordinary," *Greer*, 483 U.S. at 769 (Stevens, J., concurring), proceeding in which relief can be granted pursuant to Footnote Nine. The *Doyle* violation at Hassine's trial was significant, but we remain confident that its impact on the entire case was not so profound as to infect the very integrity of Hassine's conviction.

IV. CONCLUSION

For the foregoing reasons, the district court's Order dated October 30, 1997, will be affirmed.

NYGAARD, Circuit Judge, *Concurring*.

I believe the majority reaches the correct result, I agree with its reasoning, and, so I concur in its judgment. I write separately only to add my thoughts to Section III, D of its opinion, and express my indignation with the prosecuting attorney's misbehavior.

The concept of an accused's right to remain silent, to be free from prosecutorial comment about that silence, and to be free from any adverse consequences from accepting this constitutional protection, is so fundamental

in our jurisprudence, and is so well known among practitioners, that I cannot conceive of any alternative but that the prosecutor's use of Hassine's silence was both deliberate and calculated to invite the jury to draw an adverse inference from it. Moreover, I believe this deliberate violation of Mr. Hassine's constitutional rights is egregious – indeed, it is outrageous. The prosecutor not only questioned Hassine about his silence, but contined to do so even after objections to the questions were sustained by the trial court. This arrogance towards the court's ruling and the accused's rights, is reprehensible.

Nonetheless, on this habeas corpus review, I cannot say that his behavior, although unprofessional, "so infected" the trial's integrity, that it requires us to grant Hassine relief. Moreover, even though the prosecutor again made reference to Hassine's silence in his closing argument, considering the entire record, I agree with the majority – we cannot say that his action constituted a "pattern" of misconduct. The prosecutor's act was unfair, for which he deserves a stern rebuke. Hassine, nonetheless, received a fair trial.

Hence, although the prosecutor's behavior came very close to crossing the line of harm, and came even closer to that "unusual" case in which relief could be granted regardless of harm, I agree with the majority that it did not.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1969

VICTOR HASSINE,

Appellant,

v.

CHARLES ZIMMERMAN, Superintendent, and
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 86-6315)

Present: Nygaard, Alito and Rendell, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on August 4, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 31, 1997, be, and the same

is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: November 9, 1998

Certified as a true copy and issued in lieu of a formal mandate on December 1, 1998

Teste: /s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR HASSINE	:	CIVIL ACTION
v.	:	
CHARLES ZIMMERMAN, Superintendent, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	NO. 86-6315

MEMORANDUM AND ORDER

(Filed Oct. 30, 1997)

NORMA L. SHAPIRO, J. OCTOBER 30, 1997

I. PROCEDURAL HISTORY

Before the court is a petition for a writ of *habeas corpus*, under 28 U.S.C. §§ 2254 and 2242, on behalf of Victor Hassine ("Hassine"), a prisoner at the State Correctional Institution at Pittsburgh, Pennsylvania. Following a jury trial in the Bucks County Court of Common Pleas, Hassine and his co-defendant George Gregory Orlowski ("Orlowski") were found guilty on June 11, 1981 of first degree murder, several attempted murders, and multiple counts of criminal conspiracy and criminal solicitation. Post-verdict motions for a new trial and arrest of judgment were heard and denied. On January 4, 1983, Judge Beckert sentenced Hassine to life imprisonment for the murder conviction, plus consecutive prison terms of ten to twenty years for the conspiracy conviction and two to five years for criminal attempt. A fine of $20,000.00 was also imposed.

An appeal to the Superior Court of Pennsylvania, filed on December 8, 1983, alleged fifteen trial errors. On February 8, 1985, the court denied relief and affirmed judgment of sentence. *Commonwealth v. Hassine*, 490 A.2d 438 (Pa. Super. 1985).[1]

On May 13, 1985, Hassine, filing a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, claimed that:

1. the prosecution improperly questioned Hassine at trial about his pre-arrest as well as post-arrest silence;

2. a mistrial should have been granted upon Commonwealth's introduction of irrelevant testimony that an investigator employed by defense counsel had bribed a prosecution witness in order to secure a copy of the District Attorney's file; and

3. Hassine should have been tried separately from his co-defendant, Orlowski.

The petition was denied on April 15, 1986. *Commonwealth v. Hassine*, No. 583 E.D. Allocatur Docket 1985.

Hassine, subsequently filing a petition for writ of *habeas corpus*, then claimed:

1. his conviction was obtained by use of his silence during the period between his arrest (and *Miranda* warnings) and his trial to impeach his exculpatory trial testimony;

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[1] The judgment of sentence of co-defendant Orlowski was also affirmed. *Commonwealth v. Orlowski*, 481 A.2d 952 (Pa. Super. 1984).

2. his conviction was obtained by (a) violating his right to present a defense; and (b) penalizing him for exercising his right to counsel regarding information introduced by the Commonwealth that defense counsel's investigator bribed a prosecution witness to secure a copy of the District Attorney's file; and

3. serious prejudice by denial of his motion to sever his trial from co-defendant Orlowski.

The petition was referred to the Chief Magistrate Judge for a Report and Recommendation under 28 U.S.C. § 636 (b)(1)(B). The Chief Magistrate Judge concluded that it was unconstitutional for the prosecutor to use Hassine's post-arrest, post-*Miranda* silence to impeach his exculpatory testimony at trial. (Report and Recommendation of Magistrate, 10). Although the Magistrate Judge found the error to be of constitutional magnitude, he concluded that the error was harmless and that the writ of *habeas corpus* should be denied. (Report and Recommendation of Magistrate, 10). Hassine filed timely written objections to the Report and Recommendation.

This court granted *de novo* review of the Chief Magistrate Judge's findings in accordance with 28 U.S.C. § 636(b)(1)(C). After hearing and independent review of the relevant portion of the record, the court agreed with the Chief Magistrate Judge that error of constitutional magnitude was committed by the Court of Common Pleas in allowing the prosecution to refer to Hassine's post-arrest, post-*Miranda* silence at trial. (Memorandum and Order of November 15, 1989, 12). However, the court

ordered that the Report and Recommendation be continued under advisement on the grounds that the Chief Magistrate Judge applied an incorrect standard of review in determining the effect of the constitutional error on the verdict obtained.[2] In view of the length of the trial record and the importance to both the Commonwealth and Hassine, this court requested briefing and heard argument on several occasions specifically to address the issue of whether or not the error, although of constitutional dimension, was harmless.

The delay in deciding this case has been excessive. As an explanation but not an excuse, the standard of review changed while the court was reviewing the extensive state court record to determine if the constitutional error was harmless. This change necessitated more briefing and another careful review of the record. The prosecutor's conduct was flagrant and uncorrected or disciplined by the trial judge. The temptation to sanction it by granting a new trial was great. But the crimes of which petitioner was convicted (first degree murder, attempted murder, and multiple counts of criminal conspiracy and solicitation) were most serious.

Another factor was the extraordinary rehabilitation of the prisoner. Because he has used his legal training for

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[2] In determining that the error was harmless, the Chief Magistrate Judge stated that it was " 'highly probable that the error did not affect the judgment.' " (Report and Recommendation of Magistrate, 10, quoting *Government of Virgin Islands v. Martinez*, 847 F.2d 125, 130 (3d Cir. 1988). The "highly probable" standard is appropriate for evaluating the effect of trial error that is not of constitutional magnitude, but is not the correct standard for reviewing constitutional error.

the benefit of other prisoners, the Pennsylvania Prison Society acknowledged his efforts by a special recognition he was permitted to receive in person at an annual meeting. He has written a book, *Life without Parole: Living in Prison Today*, devoted to comments on his prison experiences, interviews with other inmates, and op-ed pieces. A reviewer found it "compelling." Tara Gray, *Life Without Parole: Living in Prison Today*, 14 Just. Q. 193 (1997)(book review). Post conviction rehabilitation, even in prison, deserves consideration under the federal sentencing guidelines, *United States v. Sally*, 116 F.3d 76, 79 (3d Cir. 1997), but in a habeas petition by a state prisoner, the only consideration must be federal constitutional error and its effect on the verdict. Pardon or parole consideration because of rehabilitation is an executive prerogative in Pennsylvania, not to be usurped by the courts, especially a federal court.

The Supreme Court has now directed that even constitutional error is harmless unless the habeas court is convinced it "had a 'substantial and injurious effect or influence' on the verdict, or if it is in 'grave doubt' whether that is so." *Smith v. Horn*, 120 F.3d 400, 418 (3d Cir. 1997)(citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); and *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995)). Although one could argue that the delay in deciding establishes grave doubt *per se*, after an exhaustive, thoughtful review, the court is not in doubt, but is firmly convinced that the error it found did not have a

substantial and injurious effect or influence in determining the jury's verdict.[3]

II. DISCUSSION

A. Legal Standard

In conducting *habeas* review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam). It is not the province of a federal *habeas* court to reexamine state court determinations on state law questions. *See Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991) (citing *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102 (1990) ("federal *habeas corpus* relief does not lie for errors of state law")). A state harmless-error rule applies to errors of state procedure or state law. An error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. *Compare Commonwealth v. Turner*, 454 A.2d 537 (Pa. 1982) (reference by prosecutor, in his cross-examination of defendant, to defendant's silence before trial constituted reversible error warranting grant of a new trial on direct appeal from the judgment of sentence) and *Commonwealth v. Clark*, 626 A.2d 154 (Pa. 1993) (grant of a new trial on the grounds that trial counsel was ineffective for failing to object to the prosecutor's impermissible reference to appellant's post-arrest silence) with *Brecht*, 507 U.S. 619 (accused not entitled to federal *habeas corpus* relief on the ground of the prosecution's *Doyle*

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[3] The court expresses appreciation for the excellent advocacy of counsel for the petitioner and the Bucks County District Attorney and for their forbearance.

error, because the error did not substantially influence the jury's verdict and was therefore harmless.)

Federal rather than state law is applicable in fashioning a rule on harmless error regarding denial of federal constitutional due process rights to a defendant convicted after a state criminal trial because 28 U.S.C. § 2254(a) allows a federal court to entertain a *habeas* petition on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Under *Doyle v. United States*, 426 U.S. 610 (1976), it is impermissible for a prosecutor to use defendant's post-arrest, post-*Miranda* silence to impeach exculpatory testimony offered at trial. *Accord, United States v. Cummiskey*, 728 F.2d 200 (3d Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985). This rule rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation offered at trial. *Wainwright v. Greenfield*, 474 U.S. 284, 291-92 (1986). The "implicit assurance" upon which the *Doyle* line of cases has relied on is the right-to-remain silent component of *Miranda*. *See Miranda v. Arizona*, U.S. 436 (1966). However, once a defendant creates the impression that he actively cooperated with the police following his arrest, his testimony may be impeached by the use of his post-arrest silence if, in fact, he did not cooperate.[4] *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975).

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[4] The Commonwealth argues that the prosecutor's reference to Hassine's post-arrest silence at trial does not constitute a *Doyle* violation on the grounds that the government was not using Hassine's right to remain silent against him, but

Cf. Doyle, 426 U.S. at 619 n.11 (use of post-arrest silence by prosecutor to challenge defendant's testimony

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was attempting to discredit the impression left by Hassine that he had been ready and willing to cooperate with the authorities.

On direct, Hassine testified that he contacted an attorney because his father's gun had been the weapon used in the shootings (N.T. 1479). His testimony was as follows:

BY DEFENSE COUNSEL:

Q. Did you receive advice from him as to how you should conduct yourself in relation to this investigation?

A. Yes.

Q. Did you follow that advice?

A. Yes, I did.

Q. What I specifically want to know: Did you go to the police at any time and tell them the facts as you narrated them now?

A. No, I did not.

Q. Why is that?

A. Under advice of my attorney we were only to contact the police through my attorneys and with counsel present.

Q. Did your attorney offer to make you available to the police?

A. Yes, he did.

Q. Did your attorney offer to make available your father, for example, in connection with identifying the gun?

A. Yes, he did.

Q. Were any of these offers ever taken up by the police authorities?

A. They were not.

N.T. pp. 1480-81.

regarding defendant's behavior following arrest is permitted if defendant claims he previously told his exculpatory story to police upon arrest).

Although the use of defendant's post-arrest silence is prohibited, a mere question or comment may constitute harmless error if the trial court effectively and explicitly quashed the prosecutor's use of the inappropriate reference. *Greer v. Miller*, 483 U.S. 756 (1987). If the *Doyle* violation was harmless, the violation is not a ground for granting a new trial or overturning the conviction. *Id.* at 765-66.

The standard for determining whether a conviction must be set aside for federal constitutional error had been whether the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967) (prosecution's reference to defendants' failure to testify at trial, in violation of the Fifth Amendment privilege against self-incrimination, required reversal of their convictions). However, the Supreme Court subsequently decided in *Brecht v. Abrahamson* that a less onerous harmless-error standard should be applied in determining whether *habeas* relief must be granted because of unconstitutional "trial error" such as a *Doyle* violation. *Brecht v.*

This court agreed with the Chief Magistrate Judge and held that Hassine merely testified that he was available to the police and did not imply that he had actively cooperated or that he had previously told police the story first offered during his direct testimony. The situation presented here is unlike the one at issue in *Fairchild, supra*, and is not subject to the exception stated in *Doyle, supra* at 619 n.11, because Hassine's post-arrest, pre-trial silence was not inconsistent with his claimed pre-arrest offer of availability.

Abrahamson, 507 U.S. 619 (1993). Trial error "occur[s] during the presentation of a case to the jury," and is amenable to harmless error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Brecht*, 507 U.S. at 629, quoting *Arizona v. Fulminante*, 449 U.S. 297, 307-8 (1991).

In *Brecht*, a suspect in a fatal shooting was arrested, given *Miranda* warnings, and charged with first-degree murder. At trial, the accused took the stand and admitted shooting the victim, but claimed that it was an accident. Over the objections of defense counsel, the state made several references during cross-examination and closing argument to the accused's pre-trial and post-*Miranda* silence about this alleged accident. The jury found Brecht guilty; he was sentenced to life imprisonment. After exhausting state court remedies, Brecht applied for federal *habeas corpus* relief based on the prosecutor's trial references to his post-arrest, post-*Miranda* silence. The Supreme Court held that Brecht was not entitled to federal *habeas corpus* relief for the prosecution's *Doyle* error, because the error did not have a "substantial and injurious effect or influence in determining the jury's verdict," and was harmless. *See Brecht*, 507 U.S. at 639 ("the State's evidence of guilt was, if not overwhelming, certainly weighty" while "other circumstantial evidence, including the motive proffered by the State, also pointed to petitioner's guilt.").

The Court had previously applied the *Chapman* reasonable doubt standard, *see e.g., Yates v. Evatt*, 500 U.S. 391 (1991); *Rose v. Clark*, 478 U.S. 570 (1986); *Milton v. Wainwright*, 407 U.S. 371 (1972); *Anderson v. Nelson*, 390

U.S. 523 (1968) (per curiam), but decided in *Brecht* that the historical distinction between direct review and collateral review of a criminal conviction should be respected. The appropriate standard on *habeas* review of a *Doyle* violation now is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict" rather than whether it was harmless beyond a reasonable doubt. *Brecht*, 507 U.S. at 638, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).[5]

Petitioner asserts this action is still governed by the harmless error test of *Chapman v. California*, 386 U.S. 18 (1967), and there should be no Brecht analysis. Citing cases in the Second and Eighth Circuits, petitioner argues that *Brecht* analysis applies only when the *Chapman* standard has already been applied in state court. *See Field v. Leapley*, 30 F.3d 986 (8th Cir. 1994); *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1063 (1994); *Lyons v. Johnson*, 912 F. Supp. 679 (S.D.N.Y.), *aff'd* 99 F.3d 499 (2d Cir. 1996). The government, arguing that the *Brecht* standard applies, cites decisions in the Fourth,

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[5] Neither party has argued that the court cannot apply *Brecht* because it was decided after Hassine brought this petition, nor does applying the *Brecht* standard present a retroactivity problem. In *Teague v. Lane*, the Supreme Court held that a new constitutional rule of criminal procedure may generally not be applied retroactively to a case on collateral review. *Teague v. Lane*, 489 U.S. 288, 307 (1989). However, *Teague* also held that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Since the Supreme Court applied the *Brecht* standard to Brecht himself, *Brecht*, 507 U.S. at 639, "evenhanded justice" requires that this court apply it to Hassine as well.

Seventh, Tenth and Eleventh Circuits. *See, e.g., Castro v. State of Oklahoma*, 71 F.3d 1502 (10th Cir. 1995); *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995); *Horsley v. Alabama*, 45 F.3d 1486 (11th Cir. 1995); *Smith v. Dixon*, 14 F.3d 956 (4th Cir.), *cert. denied*, 513 U.S. 841 (1994). In *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996), the Court of Appeals noted the split of authority, but found it unnecessary to decide because the error there was not harmless under either standard.

The Court of Appeals for the Third Circuit has not directly addressed the applicability of *Brecht* if a state court *Chapman* analysis has not been undertaken, but has consistently held that "[i]n a collateral proceeding the standard for harmlessness is 'whether the error had substantial and injurious effect or influence in determining the jury's verdict.' " *Smith v. Horn*, 120 F.3d 400, 417 (3d Cir. 1997) (citing *California v. Roy*, ___ U.S. ___, 117 S. Ct. 337, 338 (1996); *Brecht v. Abrahamson*, 507 U.S. at 637). The Court of Appeals has applied this test for harmless error whether or not a state court *Chapman* review was conducted. *Yohn v. Love*, 76 F.3d 508 (3d Cir. 1996). "[T]he Supreme Court's rationale (advancing comity, federalism, finality, and the importance of the trial) for the *Brecht* rule," *Horsley*, 45 F.3d at 1492 n. 11, applies whether or not a state court has previously conducted a *Chapman* analysis. This court must apply the *Brecht* standard.

B. Factual Analysis of the Evidence of Guilt

Hassine was arrested and charged with criminal homicide, criminal attempt, criminal conspiracy, burglary and criminal solicitation. Sometime during June, 1980,

Hassine along with Orlowski and Eric Decker ("Decker") planned the murder of Albert "Skip" Kellet, Jr. ("Kellet"). In accordance with their plans, Decker went to Kellet's apartment on the evening of August 22, 1980. Kellet and his wife occupied a second floor apartment, but Decker found them in a neighbor's first floor apartment living room with George Sofield and James Puerale ("Puerale"). Decker entered the apartment and began shooting; Puerale was killed instantly and Kellet and his wife sustained serious injuries.

At trial, Hassine offered an exculpatory explanation for his alleged participation in the conspiracy to murder Kellet. This explanation was offered for the first time during his direct testimony and was never stated to the police at his arrest or anytime prior to his trial. (N.T. 1480-1481). Hassine testified that he had a business relationship with co-defendant Orlowski; his family and Orlowski were partners in a meat market business managed by Orlowski (N.T. 1416-1419). He also testified that: a stormy relationship existed between Orlowski and Kellet; Orlowski was physically afraid of Kellet and asked Hassine to get Orlowski protection from Kellet; and Hassine subsequently contacted his father and obtained his father's gun. (N.T. 1430).

Hassine also testified: he knew Decker through the family meat market business (N.T. 1442); he learned from Orlowski that earlier the day of the murder, Decker had "entered the store ranting and raving, saying he was going to get Skip Kellet;" and Decker had taken Hassine's gun from the store for that purpose. (N.T. 1412). Hassine then stated that he set out to find Decker to stop him from carrying out his plan and to retrieve his father's

gun. (N.T. 1468). He added that apart from such involvement, he had nothing to do with the killing or attempted killings; he contacted an attorney because he was concerned that his father's gun had been the weapon used in the shootings. (N.T. 1479-1481, 1484). His attorney advised him that contact with the police should be through his attorney and in his attorney's presence. (N.T. 1480).

On cross-examination, the prosecutor asked a series of questions regarding Hassine's silence after his arrest, but prior to trial:

Q. How long have you been sitting in jail, sir?

A. Close to seven months.

Q. And you have been sitting in Bucks County Prison?

A. No, sir.

Q. You were in Bucks County Prison for a time?

A. About a month and a half.

Q. You were sitting in Holmesburg Prison?

A. For about five months.

Q. And another prison?

A. Delaware County.

Q. And conditions are not very good?

A. No, sir.

Q. You sat for seven months in prison with the knowledge of what was really involved in regard to this gun, and you just kept it to

yourself because your attorney said to keep it to yourself?

DEFENSE COUNSEL: Objection.

THE COURT: Sustained.

BY THE DISTRICT ATTORNEY:

Q. But you kept it to yourself until you came in to a court of law today and said it for the first time, in any event, outside of perhaps your family or your lawyer?

DEFENSE COUNSEL: Objection

BY THE DISTRICT ATTORNEY:

Q. For the first time?

DEFENSE COUNSEL: That is objected to.

THE COURT: Sustained.

(N.T. 1543-1544).

Although defense counsel objected immediately to each question concerning Hassine's reasons for not coming forward with his exculpatory explanation prior to trial, the record indicates that no curative instructions were given during Hassine's testimony or in the jury charge.[6] The sequence of events (three specific inquiries, three sustained objections, absence of any curative instructions and further comment made during closing) could lead the jury to draw an impermissible inference of guilt from Hassine's silence. (Memorandum and Order of November

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[6] The judge's failure to give curative instructions at the time of the objectionable questions or admonish the prosecutor for ignoring the court's rulings encouraged the prosecutor to comment again in closing on Hassine's post-arrest silence.

15, 1989, 12). This infringed on Hassine's due process rights in violation of *Doyle*.

But the *Doyle* error at Hassine's trial did not "substantially influence" the jury's verdict within the meaning of *Kotteakos* as articulated by the Court in *Brecht*: the record, considered as a whole, demonstrates that the direct and circumstantial evidence of his guilt was overwhelming. Hassine's trial lasted ten (10) days and comprised 1,800 pages of testimony. Thirty-four (34) Commonwealth witnesses were called, several of whom, including co-conspirators Decker and Orlowski, testified to Hassine's involvement in the conspiracy to murder Kellet. The evidence of Hassine's guilt is as follows:[7]

In 1979, Hassine met Orlowski and decided to go into the meat market business with him. For various reasons, the business did not prosper, and the two began selling marijuana and methamphetamine at the store to supplement the store's income. In early June, 1980, Kellet purchased some methamphetamine from Orlowski for one hundred and fifty ($150.00) dollars. Upon the discovery that the drugs were of an inferior quality, Kellet became enraged and threatened Orlowski's personal safety. A few days later, a meeting was held at the meat market. Present were Orlowski, Hassine, various employees of the meat market, and Decker, a convicted drug felon, who had been working for Hassine. At this meeting, Hassine

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[7] The following materials were used in compiling the factual analysis of the evidence of Hassine's guilt: Notes of Testimony, *Commonwealth v. Hassine*, 490 A.2d 438 (Pa. Super. 1985); trial transcript of hearing-oral argument dated December 1, 1989.

told Decker, in Orlowski's and Ronald Wharton's ("Wharton") presence, that he wanted Kellet killed, or "wasted." (N.T. 744). (In addition to Orlowski and Wharton, Joseph "Critter" Schwab ("Schwab") (N.T. 628) and Fred Tuite ("Tuite") (N.T. 562) also testified that during the summer of 1980 they heard Hassine say he wanted to see Kellet either killed or wasted.) Hassine also said that if Kellet's wife, Lois, was there, she "was to go also, because any witnesses had to go." *Hassine*, 490 A.2d at 445. Hassine also asked Billy Hayes, an employee who lived next door to Kellet, if he could shoot Kellet from Hayes' bedroom window with Hayes' father's gun. Hassine then asked everyone present to attempt to procure a gun.

In an attempt to achieve their goal, Decker accompanied Hassine to the apartment of Ted Camera, tenant of a Hassine family apartment in Trenton, to ask for a gun but they did not obtain one. In early July, Hassine obtained a .25 caliber automatic handgun from Tom Easterwood for seventy-five ($75.00) dollars and sometime thereafter gave it to Decker and said, "here, hit him in the head and leave it there." *Id.*; (N.T. 709, 933, 955). Several people witnessed Hassine and Decker test fire the gun in the back of Hassine's butcher shop only to discover that it was defective. (N.T. 30, 59, 62, 708-09, 750-52, 811, 815). Although they were unable to get a replacement part to fix the gun, Hassine purchased one box containing fifty rounds of .25 ammunition for which he signed the store's register. (N.T. 60, 708-9). Hassine's subsequent efforts to secure a firearm from several acquaintances were unsuccessful. Hassine asked Tuite and Schwab about finding a gun; they showed him a .357 Magnum, but it was too

expensive for him to purchase. (N.T. 555-56, 626-27). Hassine also asked Wharton if he could obtain a gun, but he refused. (N.T. 744, 747). Ultimately, Hassine's father's gun was used to commit the crimes.

On or about August 5, 1980, Orlowski and Hassine met with Tuite and Schwab at Orlowski's house. Tuite and Schwab were members of the Breed Motorcycle Gang and Tuite was an acquaintance of a friend of Orlowski's who also worked for Hassine. Hassine asked Tuite and Schwab how much it would cost to have Kellet killed to which they replied fifteen hundred ($1,500.00) dollars. (N.T. 561-63, 627-28). Shocked at the price, Hassine paid them two hundred and fifty ($250.00) dollars to have Kellet beaten up instead. (N.T. 564-65, 628-30). However, Tuite and Schwab never carried out the plan.

Later that month Hassine approached Decker about killing Kellet and any witnesses in exchange for an apartment. *Hassine*, 490 A.2d at 445. Wharton and Billy Hayes, both of whom were present at the meeting between Hassine and Decker, confirmed this. (N.T. 743, 813). About two and one-half weeks before the shooting, Paul Koenig, from whom Orlowski had tried to obtain an unmarked, unregistered handgun, asked Orlowski if he still needed a gun. Orlowski answered, "No, we don't need it. Victor got one"; he also stated that, "We're going to do it Victor's way." (N.T. 958-59).

On the night of the shootings, Decker testified that Hassine drove him to Hassine's parents house in Trenton, New Jersey, to pick up Hassine's father's .380 Llama handgun and then dropped him off near Kellet's apartment. (N.T. 80, 83-86). Co-defendant Orlowski witnessed

Hassine and Decker driving together towards Trenton on the night of August 22, 1980. (N.T. 1219-20). When Hassine dropped Decker off in the vicinity of Kellet's residence, he gave Decker a baseball batting helmet to cover his hair and directions to Kellet's apartment. Decker responded, "Tonight's the night – this cat's got to go. We'll use your (Hassine's) gun." *Hassine*, 490 A.2d at 446.

Hassine then went to Orlowski's house; the two of them and a third person, Michael Thompson ("Thompson"), went for a ride in Thompson's car. Hassine directed Thompson first to drive up and down certain streets while Hassine whistled out the window, and then told Thompson to stop in various parking lots near Kellet's apartment. Then they drove to a Dunkin' Donuts across from the meat market; Hassine acknowledged that he had been seen. (N.T. 867). They got back into the car and drove towards Kellet's apartment, and as they were driving they heard two shots. (N.T. 868). Hassine stated: "oh . . . , that's my father's gun. I hope that a . . . doesn't get caught." (N.T. 868-6, 881, 1224). They proceeded up the street; then Hassine asked Thompson to get out of the car and call for Decker; no one responded. (N.T. 869). Thompson dropped Hassine and Orlowski at Orlowski's house.

In addition to extensive testimony regarding Hassine's extensive involvement in the conspiracy to murder Skip Kellet, there was also substantial evidence that Hassine was involved in an attempt to cover up his participation after the crime had been committed. Decker's girlfriend, Valerie Lynch ("Lynch"), with whom Decker was living that summer, testified that Decker left the apartment around 9:00 p.m. on the night of the shootings

and came in early the next morning, August 23, 1980, with a gun and placed it between the bed mattresses. (N.T. 1038-41). After the police came by and arrested Decker, Lynch called Hassine. (N.T. 1041-44). Hassine asked her if there was a gun around and told her to get rid of it, and she did. (N.T. 1044-45). Wharton later drove her to Hassine's brother's house where she and Hassine took a walk and he asked her to lie about Decker and his whereabouts the night of the crimes. Hassine stated: "Remember Valerie, I was in New York and Eric Decker was at home." (N.T. 1050-51). Lynch later retrieved the gun and gave it to the police. (N.T. 1054).

Other witnesses also testified to Hassine's substantial efforts to cover-up his involvement in the conspiracy to kill Skip Kellet. During an intercepted telephone call between Hassine and Thompson, Hassine confirmed with Thompson that Thompson had told the police he was not with Hassine that night. (N.T. 901). According to co-defendant Orlowski, Hassine also told Orlowski to keep his mouth shut concerning the incident after the shootings took place. (N.T. 1228). According to Tuite and Schwab, Hassine considered paying them ten thousand ($10,000.00) dollars to hush up Commonwealth witnesses. Hassine made the statement that he would get back to them later, because he would first have to "talk to his old man to see if he could come up with some bucks." (N.T. 577, 631).

The only evidence Hassine had nothing to do with the crimes and was looking for Decker to retrieve his father's gun and prevent its use was that of Hassine. The prosecutor's cross-examination on his post-arrest silence attacked his credibility but it could not have substantially

affected the verdict in view of the circumstantial evidence of his guilt from untainted as well as tainted witnesses.

III. CONCLUSION:

Determining whether an error constitutes harmless error is always a difficult task. It is not possible to reconvene the jury and establish with exact certainty what they considered in reaching a verdict. Harmless error analysis must be conducted on a case by case basis; the reviewing court must weigh the evidence of guilt against the egregiousness of the error in order to determine whether, for purposes of collateral review, it substantially influenced the jury's verdict at trial. If after reviewing the record, a court concludes that the evidence of defendant's guilt was so overwhelming that the trial error of constitutional magnitude could not have affected the integrity of the proceedings, in the interest of justice, it must deny *habeas* relief on the grounds that the error could not have substantially influenced the jury's verdict within the meaning of *Kotteakos* and *Brecht*.

The court is reluctant to conclude that any error of constitutional magnitude should be characterized as harmless, but upon consideration of the overwhelming evidence of guilt presented by the Commonwealth, Hassine's petition for writ of *habeas corpus* is denied on the grounds that the prosecutor's improper reference to Hassine's post-arrest silence, although a constitutional violation under *Doyle*, did not have a substantial and injurious

effect or influence on the jury's guilty verdict.[8] The record provides clear and convincing evidence that Hassine was guilty beyond a reasonable doubt of the offenses of which he was charged. Although reference to defendant's silence was unconstitutional because jurors might view exercise of a Fifth Amendment right to remain silent as a tacit admission of guilt, the prosecutor's illegal references to Hassine's post-arrest silence were not trial errors requiring *habeas* relief in the face of the overwhelming evidence of Hassine's guilt. Plaintiff's petition for *habeas corpus* is therefore denied. An appropriate order follows.

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[8] Although the legal standard applicable to harmless-error analysis for purpose of collateral review of a criminal conviction has become less onerous as a result of the Supreme Court's ruling in *Brecht* the record establishes sufficient evidence of Hassine's guilt to suggest that the *Doyle* error would have been harmless under the *Chapman* reasonable-doubt standard as well.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR HASSINE	:	CIVIL ACTION
	:	
v.	:	
	:	
CHARLES ZIMMERMAN, Superintendent, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	NO. 86-6315

ORDER

And now, this 30th day of October, 1997, upon consideration of the pleadings and record herein, after review of the Report and Recommendation of Tullio Gene Leomporra, Chief United States Magistrate Judge, the objections filed thereto, and for the reasons set forth in the foregoing Memorandum, it is **ORDERED** that the petition for writ of *habeas corpus* is **DENIED.**

/s/ Norma L. Shapiro
J.

VICTOR HASSINE v. CHARLES ZIMMERMAN, Superintendent
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Civil Action No. 86-6315
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1989 U.S. Dist. LEXIS 13909

November 15, 1989, Decided

COUNSEL:

Donald J. Goldberg, Philadelphia, Pennsylvania.

John H. Goodwin, Asst D.A., Dist Atty of Bucks County, Doylestown, Pennsylvania, Louis R. Busico, Esq.

OPINION BY: SHAPIRO

OPINION: MEMORANDUM and ORDER

NORMA L. SHAPIRO, UNITED STATES DISTRICT JUDGE

Before the court is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §§ 2254 and 2242, on behalf of Victor Hassine ("Hassine"). Hassine is currently serving his sentence at the State Correctional Institute in Pittsburgh, Pennsylvania. Following a jury trial in the Bucks County Court of Common Pleas, Hassine and his co-defendant George Gregory Orlowski ("Orlowski") were convicted on June 11, 1981 of first degree murder, attempted murder, criminal conspiracy and criminal solicitation. Post verdict motions were subsequently denied. Hassine was sentenced to life imprisonment for the murder conviction, plus consecutive prison terms of

ten (10) to twenty (20) years for the conspiracy conviction, and two (2) to five (5) years for criminal attempt.

An appeal to the Superior Court of Pennsylvania, filed on December 8, 1983, alleged 15 points of error. The judgment of sentence was affirmed on February 8, 1985. *Commonwealth v. Hassine*, 240 Pa. Super. 318, 490 A.2d 438 (1985).[1]

Hassine filed a petition for allowance of appeal in the Supreme Court of Pennsylvania on May 13, 1985. He claimed that:

1. the prosecution improperly questioned Hassine at trial about both his pre-arrest and post-arrest silence;

2. the prosecution introduced irrelevant and prejudicial testimony that an investigator employed by defense counsel had bribed a prosecution witness to secure a copy of the District Attorney's file on the case; and

3. Hassine should have been tried separately from his co-defendant, Gregory Orlowski.

That petition was denied on April 15, 1986. *Commonwealth v. Hassine*, No. 583 E.D. Allocatur Docket 1985.

Hassine then filed this petition for writ of habeas corpus;[2] he now claims that:

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[1] The judgment of sentence of co-defendant George Gregory Orlowski was also affirmed; *Commonwealth v. Orlowski*, 332 Pa. Super. 600, 481 A.2d 952 (1984).

[2] This court has previously considered and denied Orlowski's petition for a writ of habeas corpus. *Orlowski v. Ryan*

1. his conviction was obtained by using his silence during the period between his arrest and his trial to impeach his exculpatory trial testimony;

2. his conviction was obtained by (a) violating his right to present a defense; and (b) penalizing him for exercising his right to counsel because the Commonwealth introduced evidence that defense counsel's investigator bribed a prosecution witness to secure a copy of the District Attorney's file; and

3. refusal to sever his trial from that of co-defendant Gregory Orlowski prejudiced his constitutional right to a fair trial.

The petition was referred to the Chief Magistrate for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The Report and Recommendation of the Chief Magistrate stated that there had been an error of constitutional magnitude, but this error was harmless, and the writ of habeas corpus should be denied. Hassine filed timely written objections to the Report and Recommendation. This matter is now before this court for de novo review consistent with 28 U.S.C. 636(b)(1)(C).

Exhaustion of State Remedies:

It is well-settled that, absent exceptional circumstances, a federal court will not entertain a habeas petition until the petitioner has exhausted the state remedies available at the time of his federal petition. *Picard v.*

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and The Attorney General of the State of Pennsylvania, No. 85-7110 (E.D. Pa. Aug. 27, 1987).

Connor, 404 U.S. 270, 275 (1971); *Brown v. Cuyler*, 669 F.2d 155, 157 (3d Cir. 1982), cert. denied, ___ U.S. ___, 109 S. Ct. 155, 102 L.Ed.2d 126 (1988); 28 U.S.C. § 2254(b). Each claim raised in a habeas petition must satisfy the exhaustion requirement. *See* 28 U.S.C. § 2254(c). Hassine has presented each of the constitutional issues raised in his petition to the highest state court. Therefore, he has exhausted his state court remedies. *Wojtczak v. Fulcomer*, 800 F.2d 353 (3d Cir. 1986); *Swanger v. Zimmerman*, 750 F.2d 291 (3d Cir. 1984); U.S. ex rel. *Geisler v. Walters*, 510 F.2d 887 (3d Cir. 1975).

Constitutional Claims:

Hassine claims that the prosecutor used his right to remain silent to impeach his exculpatory testimony offered at trial.

Under *Doyle v. United States*, 426 U.S. 610 (1976), it is impermissible for a prosecutor to use defendant's post-arrest, post-Miranda, silence to impeach exculpatory testimony at trial. Accord, *United States v. Cummiskey*, 728 F.2d 200 (3d Cir. 1984), cert. denied, 471 U.S. 1005 (1985). The rationale is that "it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986). Although *Doyle* prohibits the use of defendant's post-arrest silence, a mere question or comment may be harmless error if the trial court effectively and explicitly quashes the prosecutor's use of the inappropriate question or comment. *Greer*

v. Miller, 483 U.S. 756 (1987). If a *Doyle* violation is harmless error, the violation will not be grounds for granting a new trial or overturning the conviction. *Id.* at 765-66; *Passman v. Blackburn*, 797 F.2d 1335 (5th Cir. 1986).

The reviewing court must examine the record in its entirety to determine whether it is clear beyond a reasonable doubt that the verdict would have been the same absent the *Doyle* violation. *United States v. Hastings*, 461 U.S. 499 (1983); *see Chapman v. California*, 386 U.S. 18 (1967). It is necessary for the court to conduct two distinct inquiries: first, whether there was error of constitutional magnitude and second, if so, whether that error is harmless error beyond a reasonable doubt.

The District Attorney objects to the Chief Magistrate's finding that there was constitutional error, but the court has independently reviewed the record and agrees with the Chief Magistrate. *See Henderson v. Carlson*, 812 F.2d 874 (3d Cir.), cert. denied, 484 U.S. 837 (1987) (even in absence of objections to the magistrate's report, the better practice is for the judge to review dispositive legal issues raised by the report since the authority and responsibility to make an informed, final determination remain with the judge); *Consorcio Constructor Impregilo-C.R. v. Mack Trucks, Inc.*, 497 F.Supp. 591 (E.D. Pa. 1980).

Hassine's exercise of his right to remain silent was used against him by the prosecutor several times during cross-examination and closing argument. The prosecutor asked three different questions designed to raise inferences adverse to Hassine based on Hassine's post-arrest silence. Defense counsel objected to each of these questions and each objection was sustained.

On direct examination, Hassine testified that he had a business association with co-defendant Orlowski. His family and Orlowski were partners in a meat market managed by Orlowski. N.T. pp. 1416-19. He further testified to the stormy relationship between Orlowski and Albert "Skip" Kellet ("Kellet"). Hassine stated that Orlowski was physically afraid of Kellet (N.T. p. 1430) so that Orlowski asked him to get protection for Orlowski from Kellet, that Hassine then contacted his father and obtained his father's gun. N.T. p. 1430. Hassine testified that he met Eric Decker ("Decker") through the meat market business. N.T. p. 1442.

When questioned about the events leading to the murders committed by Decker on the night of August 22, 1980, Hassine testified that he had learned from Orlowski that earlier in the day Decker had "entered the store ranting and raving, saying he was going to get Skip Kellet" and that Decker had taken Hassine's gun from the store for that purpose. N.T. p. 1412. Hassine said he went looking for Decker to keep him from harming Kellet and to get his father's gun back. N.T. 1468. Hassine testified that he had nothing to do with any attempted killings or the deaths that actually occurred but contacted an attorney because he was concerned about his father's gun. The attorney advised him that all contact with the police should be through his attorney and in his presence. N.T. p. 1480.

On cross-examination, the prosecutor asked a series of questions regarding Hassine's silence after his arrest but prior to trial:

Q. How long have you been sitting in jail, sir?

A. Close to seven months.

Q. And have you been sitting in Bucks County Prison?

A. No, sir.

Q. You were in Bucks County Prison for a time?

A. About a month and a half.

Q. You were sitting in Holmesburg Prison?

A. For about five months.

Q. And another prison?

A. Delaware County.

Q. And conditions are not very good?

A. No, sir.

Q. You sat for seven months in prison with the knowledge of what was really involved in regard to this gun, and you just kept it to yourself because your attorney said to keep it to yourself?

DEFENSE COUNSEL: Objection.

THE COURT: Sustained.

BY THE DISTRICT ATTORNEY:

Q: For the first time?

DEFENSE COUNSEL: That is objected to.

THE COURT: Sustained.

BY THE DISTRICT ATTORNEY:

Q: But you kept it to yourself until you came in to a court of law today and said it for the first time, in any event, outside of perhaps your family or your lawyer?

DEFENSE COUNSEL: Objection.

N.T. pp. 1543-44.

The Commonwealth argues that this is not a *Doyle* violation because the government was not using Hassine's right to remain silent against him, but was attempting to discredit the impression left by Hassine that he had been ready and willing to cooperate with the authorities. *United States v. Fairchild*, 505 F.2d 1378 (5th Cir. 1975).

On direct examination, Hassine had testified that he initially contacted an attorney because his father's gun had been the weapon used in the shootings.

N.T. p. 1479. The testimony then continued as follows:

BY DEFENSE COUNSEL:

Q. Did you receive advice from him as to how you should conduct yourself in relation to this investigation?

A. Yes.

Q. Did you follow that advice?

A. Yes, I did.

Q. What I specifically want to know: Did you go to the police at any time and tell them the facts as you narrated them now?

A. No, I did not.

Q. Why is that?

A. Under the advice of my attorney we were only to contact the police through my attorneys and with counsel present.

Q. Did your attorney offer to make you available to the police?

A. Yes, he did.

Q. Did your attorney offer to make available your father, for example, in connection with identifying the gun?

A. Yes, he did.

Q. Were any of these offers ever taken up by the authorities?

A. They were not.

N.T. pp. 1480-81.

Hassine here stated that he was available to the police. He never claimed or suggested active cooperation nor that he told the police the story first offered during his direct testimony at trial. *cf. Fairchild, supra.* There is also a significant difference between a pre-arrest offer of availability and post-arrest, pre-trial silence. The testimony at trial that claimed a pre-arrest offer of availability through counsel was not an offer to cooperate after arrest prior to trial.

BY MR. GOLDMAN:

Q. You indicated that you were free and available to discuss this with myself and the District Attorney's office and the Falls Township Police Department at any time?

A. No, I didn't say that.

Q. You didn't say that?

A. No.

And again several questions and objections later:

BY MR. GOLDMAN:

Q. Mr. Hassine, you say that your lawyer at any time would have been willing to cooperate in this investigation in any way?

A. That's not what I said.

N.T. pp. 1544-46.

Hassine's post-arrest, pre-trial silence was not inconsistent with his claimed pre-arrest offer of availability.

Finally, *Fairchild*, the case relied upon by respondents, was decided before *Doyle*. *Doyle* subsequently made clear that nothing said by Hassine about his pre-arrest behavior could justify the use of his post-arrest, post-*Miranda* silence against him.

The Commonwealth argues that the three questions to which objections were sustained do not constitute constitutional error because the prosecutor was prevented from impeaching Hassine through the use of his silence. In *Greer*, defendant offered an exculpatory explanation for his involvement in the murder of which he was accused. The prosecutor began his cross examination as follows:

Q. Mr. Miller, how old are you?

A. Twenty-three.

Q. Why didn't you tell this story to anybody when you got arrested?

Greer, 483 U.S. at 759 (quoting from the trial court record). Defense counsel objected immediately; the trial court sustained the objection and instructed the jury to ignore the question. *Id.* In its final charge to the jury, the court again instructed the jury to "disregard questions . . . to which objections were sustained." *Id.* The prosecutor raised the issue with one question only and did not refer again to the silence of the defendant either during the testimony or the closing arguments. *Id.* The Supreme Court held that "[t]he sequence of events in this case – a single question, an immediate objection, and two curative instructions – clearly indicates that the prosecutor's improper question did not violate [defendant's] due process rights." *Id.* at 766.

In the case of Hassine, the prosecutor asked a series of questions regarding the length of time Hassine had spent in prison awaiting trial and the conditions in those prisons. After painting a picture of the unpleasantness of prison life, the prosecutor asked three questions concerning Hassine's reasons for not coming forward with his exculpatory explanation prior to trial. Although defense counsel immediately objected to each question and each objection was sustained, the record reveals no curative instructions either during the testimony or in the jury charge.[3]

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[3] The judge's apparent failure to give curative instructions at the time of the objectionable questions or to admonish the prosecutor for ignoring the court's rulings no doubt led directly to exacerbation of the problem by the prosecutor's commenting

In *Greer* there was no question that the prosecutor did not mention defendant's invocation of his right to remain silent during his closing argument. Here, notwithstanding that the objections were sustained each time, the prosecutor again mentioned Hassine's exercise of his right to remain silent during his closing argument. Because the closing arguments were not recorded, an evidentiary hearing was later held to reconstruct what took place. This evidentiary hearing took place eleven months after the actual proceeding and it may have been difficult to determine exactly what was said. But the prosecutor testified that he had an independent recollection of his closing address. He recalled that he advised the jury to look at the evidence and determine whether Hassine's testimony of willingness to cooperate with the authorities was credible. In asking the jury to evaluate Hassine's credibility, the prosecutor relied on the inconsistency between his implied willingness to cooperate and his silence and did not differentiate between pre-and post-arrest silence.

Thus, unlike *Greer*, the sequence of events in this case (three specific inquiries, three sustained objections, absence of any curative instructions and further comment made during closing) allowed the jury to draw an impermissible inference of guilt from Hassine's silence. This infringes on Hassine's due process rights as articulated by *Doyle* and its progeny.

The second step of our two-part inquiry is whether this violation of Hassine's constitutional right can be

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in closing on the subject matter to which objection was sustained. On the record before this court, the failure to admonish or sanction the prosecutor is puzzling.

harmless error beyond a reasonable doubt. In his brief sur objections to Report and Recommendation of the Chief Magistrate, Hassine contends that the wrong standard of review was used to evaluate if the error was harmless. In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that where constitutional error has been committed, the beneficiary of the error bears the burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The Report and Recommendation did mention the appropriate standard of reasonable doubt, but it also mentioned another inapplicable standard of review. In determining that the error was harmless, the Chief Magistrate stated that it was " 'highly probable that the error did not affect the judgment.' " Report and Recommendation of Magistrate, at p. 10, quoting *Government of Virgin Islands v. Martinez*, 847 F.2d 125-30 (3d Cir. 1988). The "highly probable" standard is appropriate for evaluating the effect of trial error that is not of constitutional magnitude, but is not the correct standard for reviewing constitutional error. Because both standards are referred to, it is unclear which standard of review was used in determining the effect of the constitutional error. This court must undertake a de novo review of the Chief Magistrate's finding that the error, although of constitutional dimension, was harmless.

In view of the length of the trial record and the importance to both the Commonwealth and the defendant, it would aid the court to hear argument specifically addressed to the issue remaining before it.

An appropriate Order follows.

ORDER

AND NOW, this 15th day of November, 1989, upon consideration of the pleadings and record herein, after review of the Report and Recommendation of Tullio Gene Leomporra, Chief United States Magistrate, the objections filed thereto, and for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. The Report and Recommendation is CONTINUED UNDER ADVISEMENT.

2. Further argument in accordance with the court's Memorandum of this date is scheduled for December 1, 1989 at 2:00 pm.